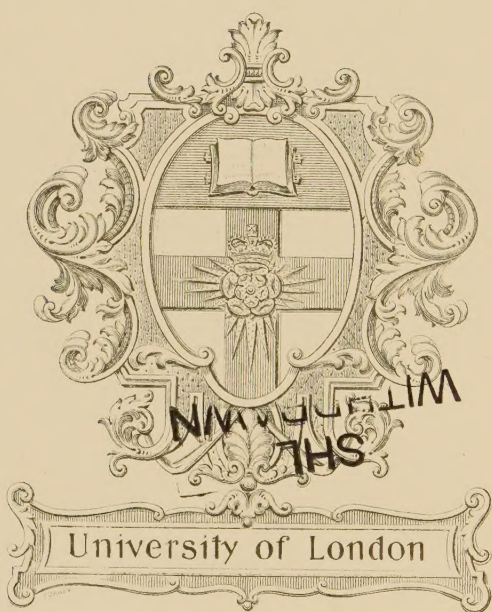






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INSTITUT DE DROIT INTERNATIONAL

Cambridge, 1931

Inaugural Address of the President,

PROFESSOR A. PEARCE HIGGINS, C.B.E., K.C., LL.D., F.B.A., Whewell
Professor of International Law in the University of Cambridge.

IN declaring open the 37th session of the Institut de Droit International, my first word must be one of profound thanks for the great honour which you, my colleagues, have conferred on me by electing me to the presidential chair. When I call to remembrance the names of the many great jurists who have preceded me, I am overwhelmed by the thought of my own deficiencies; but I know that I can rely on your consideration and on your assistance in the performance of the functions of the exalted position to which you have been good enough to call me. Fortunately I am not left alone in the task, as I have the assistance of three valued Vice-Presidents to whom I shall turn to relieve me from time to time of my duties in this chair. I feel that I shall be acting in the best interests of the scientific work of our Institut, and that I am rightly interpreting the spirit of our statutes in asking them to share with me the duties of presiding over our discussions. Moreover, I have always at hand our valued Secretary-General, to whose constant labours, not only during the sessions of the Institut but also during the periods which elapse between our meetings, we are all indebted to an extent which only those who have served on the Bureau can fully appreciate.

In the name of my British colleagues I welcome you to England, and as a Professor in this ancient University it is a pleasure to greet you here. The cities in which we have been privileged to hold our meetings have been as varied as the types of mankind who compose the states which form the Family of Nations, whose intercourse is largely regulated by the rules of International Law. Those of us who were present at our last meeting in 1929 will never forget the beautiful rural surroundings of Briarcliff, in the State of New York, nor, by contrast, the City of New York, one of the greatest and busiest centres of the world's activities; nor the impressive and beautiful city which is the seat of Government of the United States, which we subsequently visited. We recall the arduous labours of our then President and Mrs. Scott, the wonderful hospitality of the Carnegie Trustees and of other

important bodies, diplomatic, legal, and academic, and we shall always remember the great honour paid to our body by the kindly and gracious reception accorded us by the President of the United States and Mrs. Hoover.

We met in 1929 for the first time in the New World; now we are meeting in one of the oldest centres of learning in the Old World. The University of Cambridge has a continuous history of at least 700 years.

This is the second time that the Institut has honoured Cambridge by its presence. The first time it met here was in 1895, under the presidency of Professor John Westlake, one of the founders of our Institut; and, of the small number of thirty-two who then took part in the meeting, seven are still alive, and we have been delighted by the honour which the University has conferred on one of them to-day.

And now I wish to say something of the relation of Cambridge to the advancement of International Law, for which object we as a body exist. The Chair which I am privileged to hold in this University is called the Whewell Professorship of International Law, named after its founder, Dr. William Whewell, Master of Trinity College and some time Professor of Moral Philosophy in this University. Whewell showed his great interest in International Law by translating Grotius's work *De jure belli ac pacis* into English, and contributing a valuable introduction to it. In addition to founding the Professorship in 1867, he also founded scholarships in International Law and allied subjects. Whewell enjoined the occupant of the Chair to make it his aim in all parts of the treatment of the subject to lay down such rules and to suggest such measures as might tend to diminish the evils of war and finally to extinguish war among nations.

I have had four predecessors in my Chair, about whom I wish to say a few words. The first Professor was the distinguished statesman, Sir William Vernon Harcourt, whose famous letters to *The Times* over the signature of "Historicus" during the American Civil War did so much to steady public opinion in this country during those critical years. Harcourt resigned the Chair in 1887 and was succeeded by Sir Henry Sumner Maine, famous for his researches in comparative jurisprudence and the early history of Institutions. He died after holding the Chair for one year, but he has left a volume containing the lectures which he delivered during his tenure of office, in which he definitely set before himself the fulfilment of the injunctions of the founder of the Chair.

Maine was followed by John Westlake, who was elected Professor in 1888 when he had already reached the age of 60—an age at which to-day, in many of our Universities, a Professor must retire. He occupied the Chair for twenty years and only resigned when he felt that deafness was limiting his sphere of usefulness. His mental vigour remained unimpaired until his death in 1913 in his 86th year. Westlake was born in 1828, and I hope that we may regard this meeting as a belated celebration of his centenary. As a student I was privileged to attend Westlake's lectures, and subsequently to receive valuable assistance from him in the prosecution of my studies. I shall have occasion to refer again to his work, especially as an active member of the Institut, to which he was deeply attached. In my opinion he was the greatest international lawyer that England produced during the nineteenth century.

Of my immediate predecessor, Professor Oppenheim, I would speak in terms of the warmest regard and admiration, both for his personal charm and kindness and for his ungrudging assistance to any who turned to him for aid or advice in their studies, and especially for the remarkable clarity of the presentation of his subject as seen in the two volumes of his *International Law*, first published in 1905. Oppenheim was consumed with a burning love of his subject. He fervently believed that the spread of its knowledge would make for the betterment of mankind. Besides his masterly treatise, notable for its breadth of view and judicial detachment, Oppenheim contributed in 1908 to *The American Journal of International Law* a weighty article on "The Science of International Law, its Task and Method". For the members of our Institut, of which Oppenheim was for some years an ardent worker, this article contains matter of the greatest value. Again, in 1911, he contributed a monograph to the *Festschrift* for Professor Karl Binding, entitled "Die Zukunft des Völkerrechts", of which an English translation has been published by the Carnegie Trustees. While Oppenheim's outlook was essentially positive, it was blended with an idealistic philosophy of life which led him, in his enthusiasm for his work and for his colleagues in the profession, to express his creed in these words: "Ours is the faith which removes mountains, for our cause is the cause of humanity." The strain of the war overtaxed his health and he died on October 7, 1919, at the age of 61.

But Dr. Whewell's benefaction, while giving to the University these four distinguished exponents of the Law of Nations whose

works are known wherever that subject is studied, has also been the means of encouraging others to work in this field by the award of scholarships bearing his name. Of the scholars many have not continued their study of the subject but have distinguished themselves in other walks of life. To-day one of His Majesty's Principal Secretaries of State, an Anglican Archbishop, two judges of the High Court, several Members of Parliament, many Professors in other Faculties and well-known members of the Bar have been better equipped for their respective functions by the study here of International Law on Dr. Whewell's Foundation. But of the scholars many have contributed and still contribute to its literature, including one of our present number. One of the earliest scholars was Dr. T. J. Lawrence, who was for some time a member of the Institut. For many years he lectured in this University and for a short time in the United States. He has left a memorial in his book on International Law which is characterized by lucidity of thought, clearness of expression, and accuracy of presentation. He was a stalwart fighter for justice and for the weak and oppressed, and was devoted to improving the methods of the peaceful settlement of international disputes.

I cannot leave the list of Whewell Scholars without mentioning the name of Dr. T. A. Walker, who has made important contributions to the literature of our subject, especially in his *History of the Law of Nations*. Let us hope that Dr. Walker will soon give us a completion of this history.

I have given this sketch of the contributions of Cambridge men to the advancement of International Law in order that I may make you all feel at home in this University, where our subject is so highly valued and where the results of our labours during the coming week will be the object of well-instructed interest.

The former sessions of the Institut in England have been fruitful ones, both in the domain of public and of private International Law. It is by the value of the work done at our meetings that their success must be appraised. We have as our prime object the progress of International Law, and this we hope to accomplish by various ways, but chiefly by working for the formulation of the general principles of the science in such a way as to make it respond to the juridical conscience of the civilized world and to bring the rules of law into harmony with the needs of mankind to-day. It is no easy task which we have set before ourselves; it involves careful study of existing rules of law and the

possession of minds open to new impressions. But the contact with actuality must not be lost; though we walk with our heads in the air, we must keep our feet firmly planted on the earth. In this connexion I would again refer to the work and character of Westlake as illustrative of those qualities which are of the utmost value in our work. Our revered *Président d'honneur*, Baron Alberic Rolin, whose absence to-day we deeply regret, has summed them up in the remarkable memoir which he contributed to the *Annuaire* in 1913, where he gives us what I may call a sketch of the perfect member of the Institut, and may it not be said that in him we have a living example? I do not feel that any apology is needed for quoting his words, as there are, alas! not many of our present company who had the personal acquaintance of Westlake. He says:

“John Westlake ne se bornait pas du reste à assister aux sessions. Il prêtait à ses confrères une collaboration active et incessante. Il ne manquait pas une séance et il n’y avait pas une question dont il se désintéressât, car il était préparé d’avance à discuter toutes celles qui figuraient à un ordre du jour souvent très chargé et qu’on ne parvenait jamais à épuiser. Dès avant la session il avait lu et médité consciencieusement tous les rapports, tous les projets. Il écoutait avec une attention scrupuleuse jusqu’à la lecture un peu longue des procès-verbaux, toujours prêt à rectifier immédiatement ce qu’ils auraient pu contenir d’inexact. S’il prenait la parole pour défendre son opinion, dans le cours des débats, c’était toujours avec une sobriété exemplaire, avec une méthode impeccable qu’il exposait ses arguments. Nul souci de l’effet oratoire, bien que son langage respirât parfois une émotion contenue. Pas une parole inutile! Une dialectique serrée et puissante, une parfaite bonne foi.”

An opportunity such as is afforded to the President of the Institut de Droit International in his inaugural address is one when the speaker might take occasion to review the wide field of the Law of Nations, with special reference to the many questions which call for consideration, but I do not propose to take this course. The Law of Nations is a living and growing body, and the last ten years have seen many additions made to it, in fact new chapters have been written. Apart from the new material, many of the old postulates of International Law are being subjected to critical examination, and there is growing up a new sociological jurisprudence and a call to jurists to inquire how far the philosophical theory on which the subject is based conforms to the altered conditions of state life. As a body of scientific lawyers we examine the old rules in the light of modern conditions with a view to seeing what reforms are necessary so that the

observance of the law will make for justice between nations. We place first in our motto "Justitia" as precedent to "pax", as we realize that the maintenance of peace between nations can be best assisted when there is a firm conviction that the rules of law which govern their intercourse are based on this solid foundation. In our work we do well to bear in mind the saying of a great English judge of the seventeenth century, Sir Matthew Hale, that "Laws were not made for their own sakes, but for the sake of those who were to be governed by them". We realize that lawyers cannot make International Law, and we must confess that, as a class, lawyers have not a good name for being reformers of the law. Nevertheless, when we remember the great influence which in the past has been wielded by men who devoted themselves to the development of the Law of Nations from the days of Suarez, Vitoria, Gentilis, Grotius, and Bynkershoek, to our own day, and when, in particular, we look back over the history of the work of our own Institut and see how many of its proposals have been transferred from the realm of science to that of practical politics, we are encouraged to continue our work.

Various methods are enumerated in the first article of our statutes for assisting the progress of International Law, and one of them is that of giving assistance to every serious effort for its gradual and progressive codification. Codification is one of the ways indicated for advancing its progress, it is not an end in itself. Since our last meeting the first Conference for the Codification of International Law has been held at The Hague. In its deliberations in March and April of last year, as well as in the six years of preparatory work which preceded the Conference, many of our members played no inconsiderable part. The results of the Conference are generally recognized as disappointing. The attempt was made to produce a code relating to three subjects which, after long preliminary inquiry, were deemed to be ripe for codification. After a month's discussion by the delegates of forty-eight states, the results were: (1) as regards nationality, one convention and three protocols; (2) as regards the territorial sea, a series of *vœux* and recommendations; (3) as regards the responsibility of states, a confession of inability to make progress. *Montes parturiunt*. This is not a satisfactory report to make on the result of one month's deliberations by an international conference. Codification has not in my opinion been advanced, and, on the other hand, existing differences have been emphasized and new ones have emerged.

The word "codification" has several meanings, and, in the sense in which it was understood at The Hague, it meant more than the compilation of a systematic statement of the existing rules of law on the several subjects, which is its ordinary signification. It meant the making of new rules of law; in other words, legislation. Codification of this kind involves the two elements which are met with in nearly all international problems, the static and the dynamic, law and policy. To bring about a successful result, not only is the work of the lawyer essential, especially in the early stages, but the skill of the diplomatist is even more important. The respective functions of these two factors was described by Mr. Costello, the Irish delegate to the Eleventh Assembly of the League:

"The work of codification should be carried out not only by expert jurists, but equally by those who are able to examine with a view to reaching a compromise legal questions and political considerations. The part of the jurist is to define the rules, if he can, and in this case to formulate them in general principles. But as there are divergences of essential views on many points of International Law, political considerations become uppermost. Therefore, instead of having purely theoretical discussions on the rules of customary or other law, political considerations must be put forward and there must be present those who are empowered to negotiate in a spirit of compromise, if a result is desired. The experts must not have the upper hand, they must be the servants of the political ideal."

This appears to me to be a noteworthy contribution which experience has verified, it is also one which has a bearing on the functions of this body. The Resolution passed by the Assembly of the League last September, postponing for a year its decision as to its future activities in the matter of codification, might well have been prompted by a recollection of the first article of our statutes; it is at the same time a hopeful augury for our work and for that of other allied bodies engaged in a similar task. The Assembly affirmed the great interest taken by the League of Nations in the development of International Law, *inter alia* by the method of codification, and considered it to be one of the most important tasks of the League to further such development by all the means in its power. It is the development of International Law by all useful methods which is of so great importance. This Resolution is, therefore, the recognition by a body composed of the greater part of the states of the world of the value of the work which has been done or attempted to be done by the Institut for over fifty years. To-morrow we again take up our work of

endeavouring to formulate the principles of the science so as to make it conform to the juridical conscience of the world. If we succeed, as we believe we shall, we shall thus provide the material of which statesmen and diplomatists may avail themselves, and thus make a valuable contribution towards advancing the cause of Justice and Peace among the nations of the world.

A LEGAL FOOTNOTE TO THE STORY OF GERMAN REPARATIONS

By SIR JOHN FISCHER WILLIAMS, C.B.E., K.C.

It seems to be clear that, in spite of the protestations of the distinguished successors of Mr. Vincent Crummles in the theatrical management of modern international politics, Reparations have not yet made their "positively last appearance" on the stage of the world. So it is at present (January 1932) premature to attempt their complete history and impossible to compose their epitaph. But much, nevertheless, and of no little value¹ has already been written on their subject from the economic and political point of view, and it may not be out of place to add a few reflections from the standpoint of the lawyer—if only as footnotes to the more complete records to appear in the future—before Reparations cease to be part of the actualities and retire to the shelves and pigeon-holes of history. For it is hardly necessary to say that at every point of the long struggle over Reparations, the Creditor and Debtor States were confronted with questions of law. And even if legal topics alone are to be regarded, I am restrained, at once by the usual infirmities of human nature and by the fear of rekindling fires not yet wholly extinct, from attempting a complete legal survey: I propose only to inquire briefly as to the light which the story of Reparations may have to throw on certain major topics of general legal interest. And the topics as to which I would make this inquiry are: (1) the employment of arbitration; (2) the legal machinery for securing (and exacting) international payments, and herein of certain general differences in the spirit inspiring respectively the "Dawes" and "Young" Plans of Reparation settlement; (3) the limitation of the corporate responsibility of states for wrongs; (4) personality in International Law; and (5) the theory of the equality of states. What light on these matters can we get from the way in which the question of reparations has been treated?

¹ To cite three examples only: *Reparations Reviewed*, by Sir Andrew McFadyean, Benn, London, 1930; *The History of Reparations*, by Carl Bergmann, Benn, London, 1927; and the *Survey of International Affairs*, published for the Royal Institute of International Affairs, *passim*, and in particular the volumes for 1924, 1929, and 1930.

It may also be worth recording that an anonymous poet has described Reparations as "the penumbra of the eclipse of the Sun of Peace".

The Employment of Arbitration.

The text of the Treaty of Versailles, apart from the Covenant of the League, did not encourage the practice of international arbitration. It included no general arbitration clause binding upon the signatory states. Under the Economic Clauses of the Treaty Mixed Arbitral Tribunals had important functions as to the private interests of individuals, including their claims against states, and there were other minor provisions for the settlement by arbitration of matters of detail, as, for example, the cession of inland navigation craft; but the main political clauses of the Treaty were not thought to need interpretation by a court or an arbitrator.

The Reparation Chapter (Part VIII) of the Treaty raised, in this matter of interpretation, problems of its own. The reparation payments were contemplated as, in all probability, taking at least thirty years. For the settlement of the amount of the Allied claims and the determination of the methods of their enforcement and payment, provision was made in fourteen articles and seven annexes of no little complication, covering some twenty-two pages of print in an octavo volume. Over this considerable period of time, and with so elaborate a text, difficult questions were certain to arise both of interpretation and of application in situations and for events not possible in 1919 to foresee. Something had to be done about it. So the Reparation Commission, a purely Allied¹ body, was given authority to interpret the provisions of the Reparation Chapter. This may have been a political necessity in 1919, but it cannot be said to have been a solution that was likely to give satisfaction to all interests concerned during a whole generation. For, however impartially the Reparation Commission might have endeavoured to discharge this judicial duty of interpretation, its position was not such that there would have been a general belief in its impartiality. And impartiality in fact—if such had existed—would have been of little value in the absence of a general belief in its existence.

Three things—at least—should be noted with regard to the power of interpretation of the Commission:

(1) While the ordinary rule of the Commission was decision by majority, the members of the Commission had to be unanimous in giving an interpretation. These members of the Commission,

¹ I use the word "Allied" as a convenient abbreviation for the more correct "Allied and Associated". Some of the Powers which entered the war against Germany, and notably the United States, were not bound by any treaty of alliance.

the "Delegates", though not in theory, and in some cases not in practice, the mere mouthpieces of their Governments, were revocable by their Governments and had been chosen rather for administrative than for judicial capacity. The power of interpretation in these conditions was thus not full and effectual. It was hard to suppose that any interpretation could be given by a Delegate against the wish of the Allied Power which he represented on the Commission. The Commission as an interpreting body could be paralysed by the executive action of any represented Allied Power.

(2) The power of interpretation, like the rest of the Annex in which it was contained, was subject to amendment or abolition by the unanimous decision of the Allied Governments represented on the Commission.¹

(3) The thin end of the wedge of arbitration was nevertheless introduced in connexion with the power of interpretation. If the Delegates differed as to whether on any particular question a unanimous vote was required for decision, "such difference shall be referred to the immediate arbitration of some impartial person to be agreed upon by their Governments, whose award the Allied and Associated Governments agree to accept²." Thus a primitive and jealously guarded form of arbitration was provided to settle a preliminary point of procedure. But this was all. If the impartial person decided that unanimity was necessary for the decision of a "difference", there was no provision for submitting the "difference" itself to impartial decision. This very limited power

¹ Clause 22 of Annex II ran: "Subject to the provisions of the present Treaty this Annex may be amended by the unanimous decision of the Governments represented from time to time on the Commission." This remarkable provision, which, as it stood, permitted one set of the High Contracting Parties to a treaty to modify some of its most important provisions without consulting the other High Contracting Parties, and to the disadvantage of the latter, must be almost unique in diplomatic history. But, when all the *travaux préparatoires* of the Treaty are revealed—if indeed they exist in sufficient number—it is possible that it will appear that there is an explanation on the following lines: The Annex, power to modify which is there taken, was originally intended to be concerned with the constitution of the Reparation Commission and nothing more. This constitution was a domestic matter for the Creditor Powers, and it was not unreasonable to allow them by unanimous decision to amend it. But Annex II, by one of those accidents which are inseparable from all drafting under the auspices of an international conference, was allowed to include matters outside and beyond its original scope and, in particular, matters affecting the obligations of Germany, e.g. a description of the measures which the Creditor Powers might take in case of "voluntary default" by Germany. As some confirmation of this theory it may be remarked that no similar power of amendment is contained in Annexes III to VII, which deal with direct obligations of Germany for the delivery of ships, the restoration of the devastated areas, the supply of coal, dyes, and drugs, and the transfer of submarine cables.

² Treaty of Versailles, Part VIII, Annex 2, paragraph 13.

of reference to arbitration was never in fact used; had recourse been had to it on the occasion of a question as to what exactly is meant by a "question of interpretation", and how it differs from a "question of application", we might have had an interesting debate. And equally it would have been interesting to know what exactly was the practical limit of the expression "Questions involving the sovereignty of any of the Allied and Associated Powers". For on this class of question also unanimity was necessary for decision.

The gently rising waters of arbitration made their way in the first instance through the dykes and defences of the Treaty of Versailles, not by the use of this strictly limited clause, but by another chink. The interpretative powers of the Commission were, as we have seen, limited to Part VIII of the Treaty. But the Commission had duties also under the next chapter—Part IX, "Financial Clauses"—of the Treaty. Under one of these clauses (Article 260), the Commission had the power to demand that the German Government should acquire and hand over "any rights and interests of German nationals in any public utility undertaking or in any concession operating in Russia, China, Turkey, Austria, Hungary, and Bulgaria, or in the possessions or dependencies of these states or in any territory formerly belonging to Germany or her allies, to be ceded by Germany or her allies to any Power or to be administered by a mandatory under the present Treaty". When the Commission came to seek to put this power into operation, many difficulties of interpretation arose. What exactly, for example, was "a concession", or "a public utility undertaking"? After no little discussion nine points of dispute emerged on which neither the Commission nor the German Government was prepared to give way. There was no alternative but to supply the gap in the Treaty and refer the matter to arbitration. A sole arbitrator acceptable to both sides was found in Mr. Beichmann, then one of the supplementary judges of the Permanent Court of International Justice, and an arbitration was arranged in the year 1922, and was shortly afterwards held in Paris. The result of a very full and careful award was to support on some points the Commission and on others the German Government.¹ Not a little of the success of the proceedings is to be credited to the manner in which they were handled by the arbitrator. It is to be noted that the method employed, that of the single arbitrator or judge,

¹ The points at issue were purely points of the interpretation of Article 260 of the Treaty of Versailles, and so hardly of general interest. The award was not reported in this Year Book.

again showed its superiority over the method of the two arbitrators, chosen one by each side, with an umpire as the only impartial member of the court.

The ice was broken. But with the occupation of the Ruhr in the beginning of 1923, the international winter returned. True it was that the difference of opinion on the point whether in the events which had happened the Treaty of Versailles authorized the forcible occupation of German territory, by the action of two only among the Creditor Powers, raised a question or questions of treaty interpretation which, according to the Covenant of the League and as a matter of general opinion, were eminently—or at any rate “generally”—suitable for judicial or arbitral decision. But neither the German Government nor the British Government, which on this point agreed with the German view, was in a position to appeal to any existing arbitration clause, and neither the French nor the Belgian Government was ready to conclude then for the first time an agreement for reference. A possible path was indeed open to the German Government, but they did not take it. They might have asked the Reparation Commission to interpret Clauses 17 and 18 of Annex II to Part VIII, on which the French and Belgian Governments relied to justify the action taken in the Ruhr. It was common knowledge that no interpretation could have been given, as the British Delegate at any rate would not have agreed with his colleagues, and so the unanimity requisite for interpretation could not have been achieved. Such a failure of the authorized interpreters would have strengthened greatly the case for appeal to an impartial tribunal and might conceivably have provoked an arbitration between the British and French Governments, whose delegates would have been in conflict. But the Germans may have hesitated to seem to appear as litigants before the Reparation Commission—a body naturally not of good odour in German nostrils—and after all even if they had taken that difficult step there was no certainty that arbitration would have ensued. The whole incident illustrates vividly how important are psychological conditions for the establishment of the rules of International Law even in a matter which is so clearly within the province of law as the interpretation of existing international instruments and the declaration of the obligations resulting from them. Reason and argument by themselves are not enough; the minds which are approached must be open to receive them.¹

¹ Had the German Government in 1920 felt that political conditions permitted this course, they might have made an attempt to change the whole aspect of the Reparation

It was not long, as time in international matters must be reckoned, before the wind blew from another quarter. The Committee of Financial and Economic experts appointed by the Reparation Commission produced in April 1924 a plan, usually known, from the name of the American Chairman of that Committee, as the "Dawes Plan", for at any rate a provisional settlement of the German Reparation problem. At a conference held in London in August of the same year this plan was adopted by all the Creditor Powers and accepted by Germany, and with its adoption the doors of arbitral proceedings and decisions were thrown open wide. Four possible classes of arbitration were contemplated under the Plan: (1) arbitrations to settle differences of opinion as between the Delegates to the Reparation Commission; (2) arbitrations between the Creditor Powers on points arising as to the distribution of the payments from Germany (this was the subject matter of an agreement made, not in London in August 1924, but in Paris in January 1925); (3) arbitrations between the Reparation Commission and Germany of disputes on the interpretation or application of the Plan itself; and (4) arbitrations between the German Government, the newly instituted German Railway Company, and the various officials—controllers or trustees—appointed by the Reparation Commission under the subsidiary agreements or arrangements for carrying out the

question by challenging the authority of the Reparation Commission to act without an American Delegate. Such a challenge would have been plausible and not easy to answer. Politically the Allied Powers would have been forced either to come to some arrangement, or to arbitrate, or to take high-handed action which would have gravely embarrassed them in the future. Not the least of the tragic consequences of the American failure to achieve the two-thirds majority in the Senate necessary for the ratification of the Treaty of Versailles was the absence of an American Delegate, with full powers, on the Reparation Commission. Had such a Delegate been present, it is probable that the effective liability of Germany would from the outset have been fixed at 60 milliards of gold marks (see p. 21, *post*) and very possible that the Ruhr would never have been occupied. Nor should it be forgotten that the Reparation Commission was by the Treaty carefully organized so as to have always five members, and these five members were in effect compelled in every decision to give a vote, as abstention was to count as a vote against. Thus with five members the Chairman would not have had a casting vote. In fact Part VIII of the Treaty is silent on the question of a casting vote, and the casting vote only came in by virtue of a general provision (Article 437 in Part XV of the Treaty) according to which in all commissions under the Treaty a chairman was to have a casting vote. The applicability of this provision to the Reparation Commission was considered not to be disputable as a matter of law, but there can be little doubt that, when the Treaty was signed, the possibility of such an application was not foreseen. But the German Government did not take the bold course of challenging the authority of the improperly organized body, and once it had recognized the authority of the Reparation Commission without an American member, it was clearly estopped from going back and seeking at a later date to make the challenge.

recommendations of the Plan. Thus, in the future, if the Delegates on the Commission differed as to the interpretation of the Reparation Chapter of the Treaty, or as to whether Germany should be declared in default, the difference had to go to arbitration.¹ No further attempt was ever made to declare Germany in default, and consequently this major question was never submitted to arbitration, but on other points the new arbitration provisions were found to be of great practical use. In particular, arbitrations to determine disputed points on the interpretation of the Dawes Plan between the Reparation Commission and Germany were held on three separate occasions at The Hague before a tribunal whose constitution deserves a special mention. This tribunal was a permanent body, not an arbitral body put together for each dispute, and it adopted an improvement on the primitive form of arbitration tribunal—a nominee of each side and a third arbitrator who is the sole person likely, or perhaps generally expected, to be impartial—in that it was composed of five members, two of whom only were nominees of each side respectively, while the three others were appointed by the joint agreement of the two sides, one of them, the Chairman, being necessarily an American citizen. Advantage was taken of these provisions to include a lay element from the world of business and finance and not to limit the tribunal to jurists or practising lawyers. On one of these arbitrations the claims of the German Government would, if accepted, have resulted in the reduction of the Dawes annuities by a total sum of some £450,000,000.²

Lastly, before leaving the story of the arbitrations of the Reparation Commission, mention should be made of the arbitration between the Commission on the one hand and the Standard Oil Company on the other, on the question whether the oil tankers of the D.A.P.G.,³ the German subsidiary of the Standard Oil Company, were included in the German obligation to hand over the German Mercantile Marine. Did Clause 20 of Annex II, which directed the Commission “in fixing or accepting payment in specified properties or rights” to have “due regard for any legal

¹ Two separate arbitration provisions were introduced: (a) an amendment of paragraph 13 (F) of Annex II to Part VIII, providing for a reference on the interpretation of Part VIII by *unanimous* agreement of the Delegates; (b) a new paragraph (16 A) giving a member of the Commission who had voted in the minority on a proposal to declare Germany in default, a right of appeal to an arbitral commission.

² The decisions in these three arbitrations were published in the *American Journal of International Law*, Vol. XX, p. 566; Vol. XXI, p. 344; Vol. XXII, p. 913.

³ Deutsche Allgemeine Petroleum Gesellschaft.

or equitable interests of the Allied and Associated Powers or of neutral Powers or of their nationals therein" involve the liberation of these tankers, properties of a company whose shares were owned or controlled by American interests? The arbitration was of the old-fashioned kind—one arbitrator named by the Commission, one by the American Government, and one by common agreement. The decision,¹ by majority, was in favour of the Commission.

The Dawes Plan has now been superseded. The "Young" Plan has taken its place. And in the agreements² by which that Plan was adopted in January 1930, the fullest possible provision for arbitration has been made. These arbitration provisions cover not merely bare questions of the interpretation but also questions of the application of the Plan. The main arbitration tribunal is in effect a continuation of the tribunal which functioned under the Dawes Plan for disputes between the Reparation Commission and Germany—but its constitution is to be modified by allowing any Government principally concerned in a dispute and not having one of its own nationals as a member of the tribunal, to nominate an arbitrator *ad hoc*. This follows the well-known provision of the Statute of the Permanent Court of International Justice in making what must be called the usual concession to national feeling. Thus the wheel has now come full circle, and on the Reparation question, which began its career with substantially no admission of any agent of settlement except force or diplomacy, the principles of arbitration and of the appeal to reason are, on the legal side, supreme.

Machinery for Securing and Exacting International Payments.

If the authors of the Treaty of Versailles were thus economical in their provisions for the use of arbitration, it was not because they had produced a text of limpid simplicity, easy to execute and incapable of giving rise to disputes. They had in fact, though they may not have fully realized it, been confronted by a problem of no little difficulty on which history had nothing very helpful to say and for which treaties—even modern treaties—provided no adequate precedent. How were the vast payments which the provisions of the Reparation Chapter were necessarily going to impose on Germany to be secured and exacted? How far could the

¹ See *British Year Book of International Law* (Vol. VIII) for 1927, p. 156; *American Journal of International Law*, Vol. XXII, p. 913.

² See *Agreements at The Hague Conference, January 1930*, Miscellaneous No. 4 (1930); Cmd. 3484.

precedents of 1815 and 1871 be utilized, and payment be secured by the pressure of a hostile occupation? Alternatively, did Turkish, Egyptian, Greek, Chinese or South American analogies help? Should there be a specific assignment of definite revenues for securing the international payments? Or again, were the analogies of private law useful? Could a treaty usefully reproduce or adapt the formulae of a debenture trust deed? Was an international receiver practicable, or even an international receiver and manager? Monarchs in the past had for various reasons mortgaged at any rate portions of their territories, but this was a long time ago, the books were not readily available in Paris, and historians are not always alive to the nice points of the law of mortgage—a law which differs in different countries. And there was a closely allied problem as to the form which the German payments—ships, coal, dyestuffs, deliveries in kind, cash—were to take.

In the result the Treaty combined at least five different systems of, or plans for exacting and securing payments; it may be of interest to call attention to their existence, if only as a warning, should (*quod di avertant*) a similar situation ever arise in the future. These systems we may describe as (1) coercion by financial and economic measures and reprisals; (2) the system of the occupation of territory; (3) the system of bonds; (4) the analogy of the debenture trust deed and the “general charge”; (5) deliveries in kind. These methods were perhaps not wholly consistent with one another either in the letter or the spirit, but there were many cooks and each of them had a tendency to insist that his own favourite ingredient was introduced into the saucepan. We may glance at them in the order given above.

(1) *Coercion by financial and economic measures and reprisals.* This was the system established by the (to some of us) famous Clauses 17 and 18 of Annex II (it was remarkable that clauses of such potentiality should be thus inconspicuously located in an “Annex”) to Part VIII of the Treaty.¹ But were these clauses

¹ These clauses ran:

“17. In case of default by Germany in the performance of any obligation under this Part of the present Treaty, the Commission will forthwith give notice of such default to each of the interested Powers and may make such recommendations as to the action to be taken in consequence of such default as it may think necessary.

“18. The measures which the Allied and Associated Powers shall have the right to take, in case of voluntary default by Germany, and which Germany agrees not to regard as acts of war, may include economic and financial prohibitions and reprisals and in general such other measures as the representative Governments may determine to be necessary in the circumstances.

in fact confined to financial and economic measures? The French thought not. They also held that the text authorized any one Creditor Power to take whatever measures it pleased irrespective of the views of its co-creditors. And on a literal reading of Clause 18 alone there was much to be said for the French thesis. It is indeed axiomatic that one of the Great Powers of Western Europe does not publicly maintain the manifestly untenable. Our Government took another view and, before a French audience, may be allowed to pray in aid this same axiom. The controversy is fortunately dead now and I have no wish to revive it. I will merely say that if the French interpretation is right, no more abject clause was ever accepted by a conquered nation.¹ The clause, so long as it keeps ambiguity enough to admit argument as to the validity of so drastic an interpretation, can hardly serve as a precedent for the future. But even if the clause be limited, or amended, so as clearly to include only financial and economic measures and reprisals, with perhaps other steps of the same nature, it seems to embody a not very completely thought out transposition of political measures into the economic sphere. Economic and financial prohibitions may be useful and appropriate measures in what is known as a tariff war, and reprisals may have been in the past convenient methods of political pressure, though in the present and for the future they seem hardly reconcilable with a faithful observance of the spirit of the Covenant of the League, except in so far as Article 16² may be thought to embody their principle; but they are singularly inept as methods for making an unwilling debtor nation pay.

Either the debtor nation (and this is the more probable alternative) is already poor, and then the prohibitions and so forth will make it poorer and less capable of paying, or it is reasonably well off and in truth able to pay, and then it is probable that the prohibitions will irritate without proving effectively coercive. And what were the limits of these prohibitions? Was prohibition of trade with the creditor countries intended? If so, this was *pro tanto* to hamper, if not to stop German payments. Prohibition of trade with countries not parties to the Treaty could hardly have been contemplated, for this would interfere with the rights of others states: the doctrine of Pacific Blockade could not have been

¹ One of Lewis Carroll's rhymes, which I will leave it to my readers to recall, would best express the situation.

² But Article 16 is a method of *political coercion*, not a method of enforcing a payment accepted by treaty.

stretched to justify such action. Was it then intended to prohibit trade with countries parties to the Treaty but not creditors on reparation account? Trade with Brazil, Poland, Peru? The suggestion refutes itself.

But these speculations are idle. The clause was used once and once only, by the occupation of the Ruhr. The occupation was productive of a considerable amount of direct acquisitions to the occupying Powers, in the nature of what on one theory was permissible, and on another theory was not permissible, loot. But it reduced the debtor state almost to social dissolution and, if prolonged, would have damaged irreparably the psychological capacity for sustained production which is the indispensable condition of modern wealth.

But it is claimed for this use of Clause 18 and for the occupation that they were the efficient causes of the virtues of the Dawes Plan—presumably on the principle that unless you are first ill you never know how skilful a physician can prove himself. And there we will leave it.

(2) *The system of the occupation of territory.* The occupation of territory is the classical method for securing and obtaining payment of a war indemnity. And when the indemnity is of a size to allow of payment within two or three years, as in 1815 and 1871, it is an effective and not oppressive measure. But it is a political and not an economic operation. It is in no way analogous to a commercial "security" for a debt. The occupied territory does not pass into the commercial dominion of the occupier. The only economic advantage to the occupying Power is that a part of its military forces is maintained free of charge—though the debtor is *pro tanto* impoverished and rendered less capable of paying the indemnity. If a private law analogy is sought, occupation of territory resembles rather imprisonment for debt than the enforcement of a mortgage security. The debtor country is incommoded and humiliated in its daily life and thus is forcibly pressed to pay.

In the case of German reparations the occupation of the Rhineland, which normally was to last fifteen years, a third of the territory being liberated at the end of five, and again at the end of ten years, had two not wholly consistent objects. One object was to give a certain satisfaction to the strong section of French opinion, of which Marshal Foch was the spokesman; this section saw in the occupation the best military defence of France, and desired to put the military frontier of France on the Rhine.

But for this purpose an occupation limited to fifteen years was clearly useless. It was not to be expected that war would break out again within fifteen years from the date of the Treaty. To satisfy Marshal Foch the occupation should have been unlimited in duration.

The second object was to secure the payment of reparation; the occupation was to be "a guarantee for the execution of the present Treaty". But if so the occupation should have continued until payment had been made in full—that is for the thirty years contemplated by Article 233 of the Treaty. And this again was politically unendurable. The Treaty, however, included two provisions of interest: by Article 430, a German refusal to observe reparation obligations was to be followed by a reoccupation of the evacuated territory¹—a provision which, if it had been politically practicable of execution, would have met the criticism suggested above that the occupation should have been coterminous with the reparation payments. And by Article 431, the occupying forces were to be immediately withdrawn "if before the expiration of the period of fifteen years Germany complies with all the undertakings resulting from the present Treaty", a provision apparently impossible of fulfilment if understood as relating to the payment in full of the reparation debt which was to take thirty years, but which might have a meaning if understood as relating to the possibility that the Creditor Powers might succeed in selling German reparation bonds covering the whole debt. In this latter event, according to Clause 12 (D) of Annex II of Part VIII, the reparation indebtedness was to be extinguished to the amount of the nominal value of the bonds "and the obligation of Germany in respect of such bonds shall be confined to her liabilities to the holders of the bonds as expressed upon their face". Perhaps if it had been possible to fix the reparation liability at a manageable sum, this provision would have been effective. But as things were . . .

In any case, the method of taking "security" for an indemnity by means of the military occupation of territory was not scientifically worked out in the Treaty of Versailles.

(3) *The system of bonds.* In sharp contrast to the methods of enforcing payment by direct methods of coercion, whether economic coercion applied by the use of military force, or the social and political coercion applied by the occupation of territory,

¹ This provision incidentally threw light on the true construction of Clause 18 of Annex II to Part VIII—see p. 17, *supra*.

was the method of commercializing the debt by causing it to be represented by bonds, issued by the German Government to the Allied Powers and sold by them on the financial markets of the world. This is obviously, if practicable, the best method of obtaining payment of any considerable international debt. And the Treaty of Versailles contained provisions (Part VIII, Annex II, Clause 12 (c)) for the issue of such bonds—60 milliards in all to be issued at early dates and to be interest-bearing, and 40 milliards more to be issued and to bear interest according to the discretion of the Reparation Commission, and a possibility of further issues. These clauses were, it is believed, introduced into the Treaty mainly at the instance of the American Delegation, and a distinguished American financier who assisted at their birth held the view that they had the effect of limiting the German reparation liability to a maximum of 60 milliard gold marks unless the Reparation Commission was unanimous in being satisfied affirmatively that Germany was capable of bearing a greater burden. This view was difficult to defend as a matter of interpretation of the Treaty, but as an economic prophecy of what German capacity might have been it was remarkably close to the truth. Obviously had it been accepted we should never have heard of the 132 milliards.

From the legal point of view it may be noticed that the Treaty regarded the bonds, so long as they were retained by the Creditor Powers, not as the principal obligation of Germany but as a "guarantee" or security for that obligation; on the other hand, once the bonds were disposed of outright, the original international obligation of Germany was cancelled to the extent of the nominal amount of the bonds no matter at what price the bonds were sold, and the sole liability of Germany was to the holders of the bonds. It is remarkable that this provision seems not to have been harmonized with the requirement of Article 233¹ of the Treaty, requiring the whole German obligation as originally determined to be discharged within thirty years from May 1, 1921.

The Treaty bonds never had any real existence. Their place was taken by the bonds prescribed by the famous Schedule of Payments imposed on Germany in May 1921 after the Reparation Commission had fixed the German reparation liability at 132 milliards of gold marks plus a certain amount of "extras". These "Schedule of Payment" bonds were in three classes, A, B, and C, the A's and B's amounting to 50 milliard gold marks in all and carrying interest at 5 per cent. plus 1 per cent. for sinking fund, so

¹ See p. 30 *post*.

as in effect to be necessarily redeemed in thirty-seven years (seven years longer than the thirty years of Article 233), and the C's for 82 milliards carrying no interest and with time for payment remaining unfixed. These A, B, and C bonds differed from the Treaty bonds in the fact that it was in them that the total German obligation for reparations proper was to be found: they were not a security or guarantee for a separate German reparation liability. Hence they had historically the importance of in effect depriving of reality the figures of 132 milliards. Fifty milliards down could be taken as marking a definite figure presently payable, the balance of 82 milliards—C bonds—with no fixed date for payment and carrying no interest, in effect became something wholly uncertain; no definite value in present cash could be put upon these indefinite promises of a future engagement. But no one of these bonds—not even an issue of A bonds for five million dollars with absolute priority over all other German obligations—ever passed into the hands of the investing public. The truth was that with the Reparation problem in the condition to which it was brought by military and political efforts to extract payment, no progress on the lines of an issue of German bonds was possible.

With the advent of the Dawes Plan, a new effort was made to attack the Reparation difficulty by means of bonds¹ of a different character. The bonds, at any rate those of which the immediate creation was envisaged, were no longer direct obligations of the German Reich; they were—as to 11 milliard gold marks, obligations of the German Railway Company—itself a creation of the Dawes Plan—and as to 5 milliard gold marks, the bonds for the most part represented a liability of a curious institution, not expressly provided for in the Plan but devised in the course of working out its implications, known as the Bank of German Industrial Debentures, and as to a small extent a liability of certain large German industrial concerns. In all cases these bonds were guaranteed by the German Government and were to be amortized in thirty-seven years.

The Bank of German Industrial Debentures was not what in England would normally be called a bank. It was merely an institution which collected the proceeds of a special tax or levy imposed on German industrial firms as a first charge on their property and assets and then issued bonds secured on the proceeds

¹ I leave out of account the German External 7 per cent. Loan of 1924. This was a new borrowing by Germany, not a commercialization of a part of the existing Reparation debt.

of this levy. In fact it was a mere piece of machinery designed to centralize the contributions imposed on German industrialists and make them available as security for a bond issue. But again the winds of world finance were unfavourable. None of these industrial bonds were ever "mobilized". Nor was any issue ever made of the railway bonds. The bonds—or rather the system which produced them—served to distribute the burden of reparation payments in Germany itself, but they never were utilized to commercialize any part of the German reparation liability, to transfer it, that is to say, out of the hands of the creditor Governments to those of private investors. But as a method of dealing with a heavy external liability of a debtor Government the invention of these bonds was a work of great ingenuity and well deserving of careful study if any analogous situation should arise in the future. Had they been successfully sold, the resulting situation as to the railway bonds would, legally and commercially, have been not unlike that which exists in Canada, where certain railway obligations, many of which are held abroad, are guaranteed by the Canadian Government. But no exact parallel of the situation as to the industrial bonds seems to exist. The tax or levy on German industrial concerns was in the nature of a terminable rent charge, running for thirty-seven years and calculated to produce the amount necessary to pay interest at 5 per cent. during that period on 5 milliard gold marks, together with the sinking fund necessary to amortize that amount by the end of the same period. The tax was not in the nature of an income tax payable out of profits, but was a fixed imposition to be paid whatever the commercial fortunes of the debtor, and raisable, in case of default, by sale of the property subject to the charge.

The Young Plan has made obsolete all this elaborate machinery. Under that Plan, no bonds are created at the outset as part of the mechanism of payment. Germany engages to make issues of Government bonds in the future "representing the capitalization of any part of the annuity coupons not subject to postponement."¹ These bonds are not "secured" in the ordinary sense, but are protected by what is called an "assignment" of certain revenues, but the character of this assignment is peculiar; the "assignment" is in fact explained to be a "negative pledge", an expression which apparently means that the "assigned" revenues will not be pledged "for any other loan or credit" without the Creditor Powers' consent, and, if so pledged with that consent, the new

¹ See *Report of the Committee of Experts on Reparations*. Cmd. 3343 of 1929.

charge will rank after what is called the "charge" for reparation payments. As to how all this would work out were it necessary to attempt to translate this "negative pledge" and "assignment" into an effective security, it is unwise to speculate, but obviously the analogies of private law will not necessarily be helpful, and it is not easy to be confident of the success of any attempt "to appoint a receiver".

(4) *The system of the "General Charge"*. This was perhaps the least worthy of imitation of the pieces of machinery to be found in the Treaty of Versailles for the collection of reparation payments. The conception would seem to have been borrowed, without too much reflection, from the forms of debenture or debenture stock trust deeds familiar now for some sixty years to the legal draftsmen of Lincoln's Inn and the City of London.

Oddly enough the "general charge" does not appear in the Reparation Chapter of the Treaty at all; it figures in Article 248, the first article of Part IX, "Financial Clauses" of the Treaty, to which part the Reparation Commission's power of authoritative interpretation¹ does not extend. The reader should have before his eyes this remarkable provision:

"Subject to such exceptions as the Reparation Commission may approve, a first charge upon all the assets and revenues of the German Empire and its constituent States shall be the cost of reparation and all other costs arising under the present Treaty or any treaties or agreements supplementary thereto or under arrangements concluded between Germany and the Allied and Associated Powers during the Armistice or its extensions.

"Up to May 1, 1921, the German Government shall not export or dispose of, and shall forbid the export or disposal of, gold without the previous approval of the Allied and Associated Powers acting through the Reparation Commission."

Exactly what was the legal effect of this article was never determined. A plentiful and judicious use of the power of making "exceptions" given to the Reparation Commission—one of the few concessions made to the remonstrances of the German Delegation in June 1919—prevented any acute crisis.² The instinct of a

¹ The Commission was subsequently given authority by the Creditor Powers to administer and interpret Part IX, but this gave it no authority to interpret as against Germany.

² In this respect history gave an *ex post facto* justification to the very natural and human, if rather pathetic, tendency of the negotiators of the Versailles Treaty to leave over to others for settlement the difficulties which the then temper of the times made insoluble by the use of reason. So let us hope that the Muse of History, who knows how to paint as well as how to record, will pause before she uses one colour only—whether a sombre black or a dazzling white—when she deals with the action of the Reparation Commission.

British-trained lawyer was to call the charge a "floating charge". Unluckily the notion of a floating charge appeared to be unknown in continental jurisprudence, and it was thus impossible to introduce a conception familiar to one or a few only of many High Contracting Parties. And even if it had been a floating charge, how and when and with what results could it have "crystallized"? More formidable—what did the word "charge" mean in this connexion? In French—and the French text was of equal authority—the word used was "*privilège*". *Privilège*, unlike "charge", does not confer a present right of property in the thing charged. It is not the same thing as *hypothèque*. And indeed the legal conceptions of continental jurists are on this matter of secured debts so far removed from the system which has been evolved in our courts of law and equity that it was far from easy to reach any common understanding. If the English text were taken and the notion of a floating charge excluded, then on one interpretation neither the Reich nor any German "Land" could sell or exchange a square yard of land or a piece of furniture or even pay the salaries of its officials without the sanction of the Reparation Commission. More than this: there being no court available to enforce the charge or make an order for sale against the Reich of all or any part of its property, then—on the analogy of the right of states, at any rate according to some of the older conceptions of international law, to enforce their own rights by military measures—why were not the Allies, and possibly each of them acting separately, entitled to enter Germany and make itself its own (or possibly, though politically this was less likely, its own and its Allies') sheriff's officer? At one moment such a doctrine seems to have attracted important support in powerful circles. At the present time it is perhaps safe to say that all these extreme constructions refute themselves by their own absurdity.

In the end the reasonable construction seemed to be that "the cost of reparation" and other Treaty payments were to have a preference over other external payments of the Reich and the Lands. But what was meant by the "cost of reparation"? Did it include only the international debt of the Reich to the Allies—and it should never be forgotten that this was a single debt owing to the Allies jointly, not a series of separate debts owed severally to each Creditor Power—or did it include the bond debts? And if yes, were only the bond debts to the Allies or also the debts on bonds sold to the public included? And again, if yes, what (if any) were the respective priorities of bonds sold by the Allies and

bonds retained by them? And why was the property of the German "constituent States" (more accurately, since the Weimar Constitution, "Lands") subject to the charge? The German "Lands" were not debtors, any more than German private persons.

But perhaps enough has been said to suggest the necessity of a careful scrutiny of the consequences that may follow from the practice and doctrines of private law, and in particular the private law of the loan contracts of profit-making companies, before they are introduced into financial relations between states, even if those practices form, as they do form, the best available analogies on which to plan the law of international pecuniary relationships.

With the introduction of the Young Plan, the "general charge" has ceased to have effect. The shelf of a war museum would seem to be its most appropriate resting place.

(5) *Deliveries in kind.* The system of deliveries in kind in one form, that of the direct obligation of Germany as the debtor state to deliver material objects or to do certain work, was enshrined in the Treaty, and it is perhaps to be regretted that it was not thought possible politically to make a greater use of those provisions of the Treaty—in particular Annex IV to Part VIII—which contemplated the actual physical restoration of the devastated areas of France and Belgium by German labour and German materials. Such a restoration would not have meant any forcing of German goods at competitive prices in markets already overstocked, it would not have disappointed the normal expectations of French or Belgian industrialists, and would have diminished unemployment in Germany. Deliveries in kind were, however, in time developed by two methods not directly contemplated by the Treaty. By one development, and this was the most simple and obvious, payments under contracts concluded between a German seller and a purchaser of Allied nationality (or an Allied state) were effected, after official approval of the contracts by a mixed Allied-German organization working under the Reparation Commission, by means of drafts, expressed in German currency, upon the reparation credit of the Allied Government concerned, these drafts being purchased by the Allied buyer—and he was usually allowed a discount to encourage him to do his business in this way—and endorsed over to the German seller who presented them for payment in Berlin. By another development, that of the German Reparation Recovery Act, a percentage duty upon all imports from Germany into the Allied country was imposed; this duty was paid by the German exporter, who received a

voucher for the payment, and this voucher was cashed in German currency by the German Government, which then received an equivalent credit on reparation account. This in effect was equivalent to treating the given percentage of imported goods as a delivery in kind. The amounts collected in this way had naturally to be kept within the amount of the current reparation credits of the Allied Government concerned. Subsequently this rather cumbersome procedure was simplified by an arrangement under which a consortium of German exporters put up a credit in Allied currency and so avoided the separate treatment of each German export.

Economically it was supposed that deliveries in kind, whatever system was employed, lessened the strain on German currency. However this may have been, it seems at any rate clear, as the experts who were the authors of the Dawes Plan explained, that in the long run deliveries in kind, constituting as they did the removal of value out of Germany without any corresponding economic receipt, produced the same economic effect as payments in gold or in a stable currency.

Legally, there was a considerable and an obvious difference between these systems: on the first system, that of the Treaty itself, Germany as an international person was under a direct obligation to supply certain articles, the most important of which was coal, on the demand of the Allied Governments conveyed through the Reparation Commission. How Germany got the coal was not the business of the Reparation Commission or of the Allies. For the coal Germany received a credit determined according to certain rules, which turned out not to be of perfect lucidity, laid down in the Treaty. What she herself paid for it, if, as in fact happened, she bought it from her own nationals and did not supply it from any state mines which she might have happened to possess, was not directly relevant to the amount of the credit. It will be remembered that it was the failure of Germany to supply the full demands for coal made by the Reparation Commission which was decided by the majority of that body, the British Delegate dissenting, to be a "default"—a *manquement*—by Germany within the meaning of Clause 17 of Annex II to Part VIII¹ of the Treaty, and so led to the invasion of the Ruhr.

On the other hand, on the second system, no international state obligation is involved. The obligation to supply goods or services is a contractual obligation, voluntarily undertaken by one private individual in relation to another. To facilitate payment, advantage

¹ See p. 17 *supra*.

is taken of the fact that the State of the buyer has a large credit in the national currency of the seller, and that is all.

But equally in both systems the economic realm of the debtor state has transferred out of it a value for which it receives no return.

The Dawes Plan and the Young Plan.

A high American authority¹ tells us that "much international law should be based upon economics", so perhaps a lawyer who has no claim to economic learning may be forgiven if in discussing the legal aspects of the reparation machinery he strays a few yards over the boundary (and it is not a very clearly marked line) and calls attention to certain essential points of difference between the Dawes Plan of 1924 and the Young Plan of 1929-30 for determining the German liability and procuring its execution.

The Dawes Plan contained two highly interesting features both of which either disappeared or failed to receive their proper development in the later scheme: one was the provision for recalculating payments in the event of a 10 per cent. or larger change in the value of gold; the other was the provision for increasing the German payments in the event of a marked increase, measured by a combination of ingenious tests, in German economic prosperity. Thus of the two Plans the earlier was distinctly the more supple and, if the expression may pass, the more "relative", and, therefore, as it seems to a lawyer, the more scientific.

A stiff adherence to the gold standard has in fact, in these latter two years, increased by a very high percentage, which may be left to the economists to calculate, the real burden of reparation upon Germany. Is it then just to calculate long term interstate obligations in gold alone? We ought, our American authority tells us, to base much of International Law upon economics. It is, then, for the economists to see that our foundation stones are "well and truly laid".

On the other hand, the "index of prosperity" was, it may be argued, misused in the Dawes Plan, as it came into play only to augment the German payments in the event of an increase of German prosperity,² and ought to have been supplemented by an

¹ Professor E. M. Patterson, President of the American Academy of Political and Social Science, Philadelphia.

² Historically, the idea of this increase may have been suggested by the inclusion in the Schedule of Payments of May 1921 of an obligation to make a payment corresponding to a percentage of German exports.

"index of poverty" which should have come into play in the contrary event and diminished the German burden. The criticism is true, but nevertheless the Dawes Plan should have the credit of having embodied the principle that the payment should be a function of the national wealth—a principle analogous to that already suggested rather than elaborated or made practical in the Treaty of Versailles,¹ the principle known as that of "commensurate taxation", according to which the burden of taxation in Germany was to be at least as heavy as that in any of the Allied countries. But how are you to measure and compare different burdens of taxation?

In truth this principle that compulsory payments should be fixed with reference to income, familiar as it is to every County Court Judge who has to decide daily what payments a debtor is to be ordered to make on pain of the risk of imprisonment, is a principle of justice applicable also in the sphere of international relations. The practical objection to its complete acceptance as the one measure of payments, an acceptance, that is, by which the liability of the debtor country would be expressed as a percentage of its income, is that such a liability would be a bad basis for the issue of bonds. But the acceptance of this principle of relativity need not be absolute, and a minimum liability could be accepted and serve for a bond issue. In fact this very principle, in spite of its apparent exclusion, is revived in an obscure and barely recognizable form in the Young Plan in the distinction which that Plan makes between the "conditional" and "unconditional" payments. Only the "conditional" payments of the Young Plan are not scientifically determined, as would have been the case had the principle which the Dawes Plan accepted been carried through into the later settlement.

A further point of difference between the Dawes and the Young Plans, and this is a point to which more public attention has been directed, was the disappearance from the later Plan of the careful, ingenious, and elaborate measures included in the earlier scheme for the protection of the German monetary system and the whole economic fabric of Germany by preventing the transfer of payments—perhaps it would be better to say the

¹ Part VIII, Annex II, Clause 12 (b): "In periodically estimating Germany's capacity to pay, the Commission shall examine the German system of taxation, first, to the end that the sums for reparation which Germany is required to pay shall become a charge upon all her revenues prior to that for the service or discharge of any domestic loan, and secondly, so as to satisfy itself that, in general, the German scheme of taxation is fully as heavy proportionately as that of any of the Powers represented on the Commission."

"transfer of values"—out of Germany in a case where the operation was more than the economy of the debtor nation could support. This is hardly the occasion, nor is the present writer qualified, to discuss these measures of transfer protection; their place was to some extent taken by the provisions as to the "conditional payments", to which a reference has just been made. Let it suffice to remark that their disappearance was another and a striking illustration of the effort of the authors of the Young Plan to achieve an absolute, if not a static, solution and to leave behind them the relativity which had characterized the work of the Dawes Committee. This was perhaps inevitable. The Young Committee were charged by their terms of reference to produce a "complete and final" solution of the reparation problem. And yet, eminent as were the statesmen who composed this formula, they were in fact seeking, and vainly seeking, to escape from the operation of that law of change which governs all continuing problems of the Universe.

The Corporate Responsibility of States for Wrongs.

There is one fundamental question which the story of Reparations suggests and on which it may be well to say a few words, however imperfectly.

We have seen that the Treaty of Versailles proposed that reparation payments should not continue, in principle, for more than thirty years.¹ There is little doubt that the underlying thought of this provision was that it was just to limit to the existing generation of Germans the obligation to make reparation. Such a limitation is a recognition of the principle that, in scriptural language, the sins of the fathers should not be visited on the children, but the limitation obviously does not carry out the principle to the full. For it throws part of the burden on many men who were in their schools and nurseries or even unborn when war was declared, and who can have had no sort of responsibility for its inception or its conduct. It is, however, difficult to see how

¹ The exact language of the last paragraph of Article 233 is: "The Commission shall concurrently draw up a schedule of payments prescribing the time and manner for securing and discharging the entire obligation within a period of thirty years from May 1, 1921. If, however, within the period mentioned, Germany fails to discharge her obligations, any balance remaining unpaid may, within the discretion of the Commission, be postponed for settlement in subsequent years, or may be handled otherwise in such manner as the Allied and Associated Governments, acting in accordance with the procedure laid down in this Part of the present Treaty, shall determine."

It will be seen from the last sentence that the recognition of the liability of one generation can properly be called a recognition "of principle" only.

it would be possible to combine any full or accurate execution of this principle of a liability limited to a collectively wrong-doing generation, with the maintenance of the recognition of the corporate existence and therefore corporate responsibility of the state. The perfectly just solution would seem at first sight to be that reparation creditors should receive satisfaction solely out of the assets, actual and potential, of the state, in its international as distinct from its domestic capacity, as they stand at the conclusion of peace, and that this should be so even though many individuals who had no responsibility for policy, no power of influencing it, and were even opposed to what was done, may suffer. "*Quidquid delirant reges, plectuntur Achivi.*" A solution on these lines is indeed suggested by Article 231 of the Treaty of Versailles, when it recognizes that "the resources of Germany are not adequate" to make the complete reparation which, as the Treaty alleges, ought to be made by Germany, and on the basis of that recognition abstains from enforcing what would on this hypothesis be the full German liability. The Treaty, however, failed to apply the same principle to the liability which it did in fact impose.¹

But any solution involving a *complete* exhaustion of the actual assets of a state, on the analogy of bankruptcy in private law, must in practice prove incapable of application. The assets of a state cannot be "realized" or sold, partly because there are no purchasers, and partly because you cannot wind up a state as if it were a commercial concern. The state must continue to function. On the other hand, the present "assets" of a state, in the sense in which the word is here used, include the taxable capacity of its existing nationals, or such part thereof as is available when the necessities of the existence of the state have been satisfied, and the capacity of the state for borrowing. If a state is not permitted to go bankrupt with reference to its international reparation liabilities (although by its power of inflation, it can always, if it is prepared to inflict much injustice and much suffering on its own nationals, perform an analogous operation as to liabilities expressed in its own currency) it ought at any rate to be recognized that it is wrong to seek to impose on it a liability that exceeds its capacity for payment, including its capacity to borrow, as that capacity stands at the end of the war or within some very short period—say

¹ On this whole subject Dean Roscoe Pound's lecture on "Philosophical Theory and International Law" (*Bibliotheca Visseriana*, Vol. I, at p. 79) may be consulted with profit. Dean Pound speaks of "the juristic dogmatic fiction that treated the mass of a population collectively as equivalent in moral responsibility to an individual man".

one year—after the conclusion of peace. Tried by this test, the liability imposed on France in 1871 was not excessive in amount, unfortunate and ill-conceived though it may have been as a precedent of international behaviour. Can the same be said of the German reparation liability?

It is perhaps not always fully recognized how widely the state differs from any of the other aggregate bodies on which the necessities of civilization have bestowed corporate capacity—the capacity, that is, to own rights and to incur duties, which are not the rights and duties of the individual members of the aggregate body. As a general rule no person becomes a member of a body corporate of municipal law unless by his own action, and when he has become a member, his liability to contribute to the debts of the body corporate is, as a rule, limited to some fixed sum. But membership of a state is in its beginning independent of personal volition, and the liability of members of a state for the debts of the state, including those which have their origin in an international tort or what is alleged with indisputable force to be such, is limited only by the very elastic test of taxable capacity. Nor is the relationship of the individual to the state in respect of his ability to sever the tie that binds him, the same as his relationship to the normal trading corporation of municipal law. It is still possible for a person, though restrictions on immigration have gravely limited the freedom of movement which used to be recognized as a “right of man”, to change his allegiance without finding a substitute, but a shareholder must, as a rule, find a transferee before he can part with his shares. On the other hand, the ties of sentiment and convenience that bind an individual to his own national society are far stronger as a rule than those that bind him to a trading concern.

Again, the assets of a trading concern and of any body corporate, to which alone its creditors, on whatever account and however meritorious their claim, can look for satisfaction, are, apart from rare instances of companies with unlimited liability of the shareholders, a fixed quantity. A body corporate of municipal law has normally no power to expand its possessions and to draw upon the private resources of its servants, its corporators, or its neighbours.

Such considerations point to the desirability, which indeed, as we have seen, is partially and imperfectly recognized in the Treaty of Versailles, of imposing some limit on the liability of a state, but they do not justify a conclusion that there should be no liability of a state as a body corporate for an international wrong,

and that satisfaction should be sought only from those individuals who, as directors of policy, may be thought to have a personal responsibility. For the state as a whole has acted and it has a responsibility as a whole. If the wrong—for we are discussing the point on the assumption that there *has* been a wrong¹—had succeeded, the whole population would have benefited, or have been thought, according to current or formerly current opinion, to have benefited. *Qui sentit* (or, *qui sensurus erat*) *commodum, sentire debet et onus*. On the other hand, we must not, by the recognition of corporate capacity, run away from the realities of life and from the demand of justice that a perpetual liability should not be imposed on a new generation or even affect the after-acquired property of a reformed bankrupt. And this last principle is of special applicability when the internal constitution of a state has been radically changed.

It is perhaps not over-fanciful to add that this suggested limitation of the liability for international wrongs of the state as a continuing person of International Law, is in line with recent developments of state trading. The modern state tends now to undertake new functions; in particular all or most of the belligerent states did so during the war. But the tendency is not to make the state as an international person, nor even the state as a whole, in its sovereign municipal capacity, liable for the debts incurred in such trading. Rather are special bodies corporate set up, of which the state supplies the capital and in which it is thus the sole or the principal shareholder, but which are legally distinct from the state and whose creditors cannot look to the state for satisfaction. Such solutions are indeed obviously more just and more convenient than the crude doctrine, still unfortunately accepted by English law, according to which the state carries its sovereign immunity into those regions of commerce where it is clearly inappropriate and out of place.

Personality in International Law.

What was the Reparation Commission? Was it a mere name for a temporary partnership of the Powers creditors of Germany on reparation account, or was it a *persona*, a right and duty-bearing entity of international and also in certain relations of municipal law?

A study of the relevant articles of the Treaty of Versailles and

¹ i.e. *culpa* on the part of the authorities of the state. Cf. Lauterpacht: *Private Law Sources and Analogies*, &c., Longmans, 1927, pp. 135 ff.

observation of the actual proceedings of the Reparation Commission can hardly leave doubt that the Commission possessed international personality. The Treaty distinguishes the Commission from the Governments "represented" upon it.¹ The Commission possesses certain powers and has certain duties conferred upon it by a treaty to which the governments represented are not the only parties, and which therefore they could not revoke at their own arbitrary discretion.² The Commission could not, for example, validly be ordered by the Allied Governments not to give Germany "a just opportunity to be heard", nor could its discretion to extend the date and modify the form of payments have been withdrawn by unilateral action to which Germany was not a party. The Commission had judicial functions and its decisions, duly given in exercise of those functions, bound all parties to the treaties. A Delegate was not a diplomatic representative taking decisions *ad referendum*. A decision of the Commission was a final act; if a government was dissatisfied with its Delegate, it could recall him, but the governments possessed nothing in the nature of a general power of ratification, and therefore also disallowance, of what the Commission did. A Delegate was not in law the agent of his national government nor would it be accurate even to call him a plenipotentiary. He drew no salary from his government. Whether a Delegate acted always under instructions from his government or not, was the private affair of his government and himself. A Delegate had not to produce "full powers" to be examined and found to be in "good and due form". And in most matters, and this is a strong confirmation of the independent character of the Commission, the Delegate was bound by the decision of the majority of his fellows. The Commission is thus clearly distinguished from a diplomatic congress. It had no resemblance to the Ambassadors' Conference. The fact that the Commission was the "exclusive agency" of the Creditor Governments "for receiving, selling, holding and distributing"³ reparation payments did not impair its personality or make it in law in other matters a mere agent of those Governments. And, indeed,

¹ Thus Article 234 says: "The Reparation Commission shall after May 1, 1921, from time to time, consider the resources and capacity of Germany, and, after giving her representatives a just opportunity to be heard, shall have discretion to extend the date, and to modify the form of payments, such as are to be provided for in accordance with Article 233; but not to cancel any part, except with the specific authority of the several Governments represented upon the Commission."

² So Article 240 speaks of "the power and authority given to it (the Commission under the present Treaty)".

³ Treaty of Versailles, Part VIII, Annex II, Clause 12.

an agent is a person distinct from his principal. Further, the Commission was itself recognized in the Treaty of Versailles as a principal in the international world; it had "agents" of its own, who were not the agents of the Creditor Powers. These agents were to be accorded by Germany "the same rights and immunities" as those of "diplomatic agents of friendly Powers".¹

This distinct personality of the Commission was implicit in its activities and its methods of business. The Commission conducted, as we have seen, arbitrations with the German and with the American Governments. The Commission took leases of property in Paris in its own name. The Commission never, so far as my recollection goes, treated itself as being a mere name for the general body of the Creditor Governments or as a collection of individuals with personal liability for ordinary contractual engagements, such as leases or contracts of service. The whole conduct of the Commission was in line with the theory of a distinct personality in the international world, carrying with itself that same status into the world of municipal law, so far as in the municipal sphere it had necessary activities.² And that the Commission had what was thought to be a limited duration marked out³ for its existence is no evidence of lack of personality. Most, if not all, continental systems of law allow commercial companies to fix by their statutes, should they be so minded, what is to be the term of their legal lives. But the personality of these companies is not a matter of doubt.

In these conditions, it would seem that some further qualification, beyond that resulting from the establishment of the League of Nations, is needed to the old rule that "States solely and exclusively are the subjects of International Law".⁴

Equality of States.

This subject has been treated already by Mr. Noel Baker in this Year Book,⁵ but it is worth while after eight years to observe

¹ Thus Article 240(3) of the Treaty of Versailles says: "The German Government will accord to the members of the Commission and its authorized agents the same rights and immunities as are enjoyed in Germany by duly accredited diplomatic agents of friendly Powers."

² I may venture on this subject to refer to what I have written already in *Chapters on Current International Law*, &c., Longmans, London, 1929, pp. 498-9.

³ See Treaty of Versailles, Part VIII, Annex II, Clause 23: "When all the amounts due from Germany and her allies under the present Treaty or the decisions of the Commission have been discharged and all sums received, or their equivalents, shall have been distributed to the Powers interested, the Commission shall be dissolved."

⁴ Oppenheim, *International Law*, 4th ed., Vol. I, Peace, pp. 20-1.

⁵ *British Year Book of International Law*, 1923-4, pp. 1-20.

how the constitution and practice of the Reparation Commission has confirmed the main thesis of his argument. It would have been clearly impracticable to give to every Power which claimed a share of Reparations equal representation on the Commission.¹ It was also impossible, for obvious reasons, to confine representation to the "Great Powers", and to give Japan, with her percentage of less than 1 per cent. of the reparation debt, permanent representation to the exclusion of Belgium with her 8 per cent. and her priority of $2\frac{1}{2}$ milliards of gold francs, and of Yugoslavia to whom (subsequently to the Spa Agreement) a share of 5 per cent. was allotted. The principle of the amount of the pecuniary interest of a state had to have some recognition. At the same time Reparations were far from being a purely business matter. They clearly involved considerations of high politics. A meeting of the Reparation Commission was not a shareholders' meeting, where voting power goes, more or less, according to the respective shareholdings. Therefore, permanent representation was to be given to the United States, although that Power made no claim to reparation properly so called. In the event, the composition of the Commission resulted from a compromise between different principles. The Delegates were to be nominated by the United States, Great Britain, France, Italy, Japan, Belgium, and Yugoslavia. But²—

"On no occasion shall the Delegates of more than five of the above Powers have the right to take part in the proceedings of the Commission and to record their votes. The Delegates of the United States, Great Britain, France, and Italy shall have this right on all occasions. The Delegate of Belgium shall have this right on all occasions other than those referred to below. The Delegate of Japan shall have this right on occasions when questions relating to damage at sea, and questions arising under Article 260 of Part IX (Financial Clauses) in which Japanese interests are concerned, are under consideration. The Delegate of the Serb-Croat-Slovene State shall have this right when questions relating to Austria, Hungary, or Bulgaria are under consideration."

In practice this rather difficult clause came to mean that on all ordinary occasions the Belgian Delegate had a seat and a vote on the Commission. But Powers entitled to 7 per cent. of reparations

¹ According to the Spa Agreement of July 16, 1920 (and therefore prior in date to the determination of the German reparation liability and the examination of the reparations claims of the Allied Powers) the sums received from Germany in reparation were to be divided, 52 per cent. to France, 22 per cent. to the British Empire, 10 per cent. to Italy, 0.75 per cent. to Japan, 8 per cent. to Belgium, 0.75 per cent. to Portugal, 6.5 per cent. being reserved for Greece, Roumania, Yugoslavia, and the "other Powers entitled to Reparation" but not signatories of the Spa Agreement.

² Treaty of Versailles, Part VIII, Annex II, Clause 2.

had in practice no seat, the right of Yugoslavia under the Treaty of Versailles not being effective for German questions, and had the good sense to allow their interests to be dealt with by other Powers more deeply concerned. It would be interesting, did the scope of this paper and the space available permit, to trace out in the other treaties, those with Austria, Hungary, Bulgaria, and Turkey, the different applications of the sound principle that international business cannot be conducted on the fantastic basis that at all times, in all places, and in all relations the groups of human beings who have constituted themselves into states and been recognized as such, counting each for one and no one of them for more than one, must perform exactly the same functions. But it may be permitted to mention that the older political principle of the "Concert of Europe" as distinct from the rules of modern business, found strong recognition in the Treaty of Neuilly with Bulgaria. The Inter-Allied Commission, which largely took the place of the Reparation Commission for the purposes of the Bulgarian Treaty, was composed of three members appointed by the Governments of the British Empire, France, and Italy. But these Powers did not hold even a majority of the shares in the reparation payments of Bulgaria.

These are discursive remarks, and it may be well to summarize them for the benefit of any benevolent reader. Let us then say that the history of the reparation problem, as handled from 1920 to 1930, suggests, as to the topics with which this paper deals, something like the following conclusions.

(1) It is impracticable to carry out an international transaction of long duration and considerable complexity without providing some form of arbitral or judicial machinery for the settlement of differences. The attempt to do without such machinery, in the Reparation Chapter of the Treaty of Versailles, broke down. It ought to be recognized that it is indispensable to include in every treaty or international arrangement a carefully drawn and all-embracing clause providing for the judicial or arbitral settlement on legal principles of differences arising in the course of the execution of a treaty, whether those differences are as to the interpretation of the text or as to the application of the text to external circumstances. Recent developments encourage the hope that this will become a commonplace of international intercourse.

(2) The collection or exaction of international payments on a

large scale needs very special machinery. Direct physical force is not a serviceable instrument, and if it is to be employed without a violation of law, the terms of the treaty invoked must be unambiguous. It is not readily to be assumed that a treaty authorizes the employment of methods which, however well organized, are in essence merely the collection of booty in the shape of such tangible wealth as in a civilized community lies ready to hand or is collectable by manual labour—methods which do not reach the riches of a modern community; these riches depend on the voluntary exercise of mental capacity and are not forthcoming at the lash of physical coercion. Commercial methods, and especially the sale of bonds to provide the means of paying the international debt, are preferably to be employed, as they give the best opportunity of realization, but the efficacy of such procedure is limited by the commercial and financial possibilities.

(3) The world has at present no satisfactory doctrine or practice for putting the burden of what are deemed to be international wrongs on the shoulders of individuals who, personally or as members of the state at the critical date, may justly be considered responsible. The analogy of a commercial private-law bankruptcy suggests a principle of settlement but not a model to be copied exactly. The object aimed at should be to make the existing “assets”, in the widest sense, of the debtor state available, but subject to the necessity of the continuance of the life and energy of the state on a civilized scale; after the exhaustion of those assets there must be a clean slate, “*novae tabulae*”.

(4) The old dogma that states alone are the subjects of International Law is no longer true.

(5) The doctrine of the equality of states must not be taken to mean that every state in any transaction has a right to perform exactly the same functions as each of the other states concerned.

UNRECOGNIZED STATES: CASES IN THE ADMIRALTY AND COMMON LAW COURTS, 1805-26

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THE early cases in the Court of Chancery which arose out of the existence of unrecognized states were discussed in the last volume of this Year Book. The purpose of this article is to give some account of similar cases in the Admiralty and Common Law Courts in the same period.

I

Admiralty Cases.

In 1805, the Vice-Admiralty Court at Halifax, Nova Scotia, considered the case of two American ships, the *Dart* and the *Happy Couple*,¹ which had been captured on their way to St. Domingo. This island was a French colony, whose native inhabitants had revolted with such success that at the time of the capture a considerable portion of it was under their control.² It was contended for the claimants that, in these circumstances, the island could no longer be regarded as an enemy colony.³ The Court, however, considered that, whatever the *de facto* situation might be, the matter depended on the attitude of the British Government towards the revolutionaries. Though there had been "certain reciprocal civilities between the negroes and the British Admiral", there was nothing in any treaty, public declaration, or instructions to cruisers to show that Great Britain had acknowledged the island's independence. It was held, therefore, that St. Domingo must still be considered a French colony, and the ships were condemned.

This decision was affirmed on appeal early in 1808. Very shortly afterwards, a similar case, the *Manilla*,⁴ came before Lord Stowell. While approving the decision in the *Dart* and the *Happy Couple*, he observed that since their capture certain Orders in

¹ Stewart's Vice-Admiralty Cases, Nova Scotia, 65.

² These events also led to cases in the American Courts; for a discussion of them and the English cases, see Dickinson, "Les Gouvernements ou États non reconnus en Droit Anglais et Américain", *Rev. de Dr. Int.*, 1923.

³ Earlier disturbances in the island gave the opportunity for a similar contention in the *Immanuel*, 2 C. Rob. 186; Lord Stowell, however, was not satisfied with the evidence offered of the insurgents' success.

⁴ Edw. Adm. 1.

Council had permitted British vessels to trade to ports in St. Domingo not under French control. He held, therefore, that the *Manilla* could not be considered as trading to an enemy port. In the next year the Lords of Appeal followed this decision, and summed up the principle underlying these cases by stating that "it always belongs to the government of the country to determine in what relation any other country stands towards it; that is a point upon which courts of justice cannot decide".¹

Some of the legal effects of non-recognition were considered in cases arising out of the struggle of Spanish-America for independence. The first of these cases, the *Mary*, is not in the regular reports, and the following account of it is taken from various sources.² In July 1814, the port of La Guaira in Venezuela was in the occupation of the insurgents. On the appearance of Spanish troops, the town was thrown into confusion, of which a British warship took advantage by sailing into the harbour and cutting out the *Mary*, an American privateer anchored there. When proceedings were taken in the Vice-Admiralty Court at Tortola, the commandant of La Guaira³ protested on the ground of the violation of Venezuela's neutrality, and the Court refused to condemn the vessel. In 1817, however, this decision was reversed on appeal, Lord Stowell declining to admit the territorial claim, as Venezuela had not been recognized by this country.⁴

Two years later, in the *Hercules*,⁵ the status of the South American revolutionaries was again considered. The *Hercules* was

¹ The *Pelican*, Edw. Adm. App. A.

² Folio Prize Appeals in the Inner Temple Library, 1814-17, 202, for the facts and preliminary proceedings. That the reason for the decision was as given above is shown by (a) the account of the case given by Best C.J. in *Yrisarri v. Clement*, *The Times*, February 9, 1826; (b) Arnold MSS., January 16, 1817, P.R.O., H.C.A., Misc. Bdle 469; (c) Nicholl's Notes on Prize Appeals, 1794-1817, P.R.O., H.C.A., Misc. Bdle 466, p. 156. The last two references are to the manuscript reports in the Public Record Office, described by Mr. Gaskoin in *B.Y.I.L.*, Vol. IV, p. 78.

³ Josef de Sata y Bussy, who was also Minister of War in the Venezuelan Government.

⁴ Another case may be mentioned—the *Walker*, Inner Temple Prize Appeals, 1815-18, 60; Arnold MSS., December 10, 1817; Nicholl's Notes on Prize Appeals, 1794-1817, p. 158. In 1813, the commanders of a British privateer and a Spanish guarda costa agreed to capture some American whalers which were in or near Coquimbo, then in the occupation of the Chilean insurgents; the Spanish were to keep any vessels found to be carrying goods to the insurgents, and the rest were to be left to the British. In accordance with this arrangement, the *Walker*, captured by the Spanish, was handed over, and condemned by Lord Stowell. On appeal, the Spanish Ambassador lodged a protest on the ground of infraction of Spanish territorial waters. The decision was upheld, but it does not clearly appear whether the reason was a denial of Spain's claim to treat waters off a coast which she had for some time ceased to occupy as territorial, or merely want of evidence that the capture had been made within the limits. ⁵ 2 Dods. 353.

a vessel sailing under the colours of the Government of Buenos Ayres, and had been part of an armament equipped to prey upon Spanish commerce, but was apparently owned by British subjects.¹ Wishing to refit, she put in to Bridgetown, Barbadoes, where the authorities were very dubious about the scope of her activities; accordingly, a ruse was adopted to get her to Antigua, in order that the British Admiral might be consulted. She was eventually condemned there for a breach of the Navigation Laws, a claim by Buenos Ayres being rejected. On appeal, the decision was reversed, as the Antigua court was held to have no jurisdiction, the original capture having taken place in Barbadoes. Other points involved were not decided, but in his judgment Lord Stowell remarked that the South American communities were "upon all ordinary principles of law, in peril of being considered as mere insurgents by the tribunals of those Governments which have not acknowledged them. No man can take upon himself to say that it belongs to those tribunals to determine the question of independence upon which their own Governments find it necessary to be silent".²

From these cases, it can be seen that the Admiralty judges, like the Court of Chancery, had no hesitation in laying down that "the Courts of the King should act in unison with the Government of the King".³ Thus, a French colony in the hands of revolutionaries had remained a French colony until the British Government had made some declaration negating its enemy character; and claims on behalf of the unrecognized communities of South America had been rejected.⁴

II

Cases in the Courts of King's Bench and Common Pleas.

The cases in the Common Law Courts, like those in the Court of Chancery, largely arose out of the obtaining of loans and supplies in this country by the South American Republics. The Common Law Courts, however, did not take such strict views as were held in the Court of Chancery of the duties of a court where an unrecognized state was concerned. They had, nevertheless, no

¹ The commander, William Brown, was an Admiral in the Buenos Ayres service; the *Hercules* was a privateer partly fitted out by him.

² At p. 359. The *Hercules* was eventually restored by the British Government.

³ Shadwell, V.-C., in *Taylor v. Barclay*, 2 Sim., 214.

⁴ Lord Eldon refused to allow an unrecognized government to sue here in *City of Berne v. Bank of England*, 9 Ves. Jun. 347.

hesitation in holding that the supply of arms and equipment to expeditions leaving this country for South America was illegal. In *Woolly v. Herring and Co.*,¹ a case decided after the Foreign Enlistment Act, 1819, but concerning a transaction completed before it, Abbott C.J. held that the plaintiff was not entitled to recover the price of arms supplied to his knowledge for that purpose.² It was also mentioned in that case that an action for freight against General Devereux,³ who organized more than one expedition to South America, had been similarly dismissed. The earlier statutes⁴ against foreign enlistment were held not to apply to the furnishing of stores in *Monkhouse v. Bousfield*;⁵ but the plaintiff was not allowed to recover a general average contribution on lead destined for the Venezuelan Government but jettisoned to save the defendant's vessel, Chief Justice Dallas saying "this was the law in cases of neutrality. It would be illegal to supply any of the belligerent parties with warlike stores".

The next cases to be mentioned concern the loans raised by South America in England. In 1822 Abbott C.J. heard an action for damages for non-performance of a contract to sell Colombian bonds.⁶ The defence was Sec. 7 of 7 Geo. II, c. 8, which made void all contracts for the sale of "public stocks and securities", of which the vendor was not possessed at the time of the contract. The Chief Justice said that he must take this expression to mean "securities recognized by the British Government"; of the meaning of the words "Colombian bonds" he could judicially know nothing; therefore, he could not say that the statute applied, so the plaintiff was entitled to recover. Thus, while the non-recognition of Colombia was held to take the transaction out of the scope of a statute,⁷ it did not otherwise affect the issue. Similarly, no

¹ *The Times*, July 14, 1820.

² For a case in which such knowledge was not proved, see *Thatcher v. Thompson*, King's Bench, *The Times*, February 26, 1826 (arms for Venezuela).

³ "The passage of the Foreign Enlistment Act seems to have had little effect upon the promotion of expeditions, for within a month General Devereux, after an elaborate public banquet in Dublin, took another expedition to South America." (Paxson, *The Independence of the South American Republics*, p. 192.) His activities led to at least one case in the Irish Courts, *Walsh v. Sutton*, *The Times*, March 1, 1820, where the plaintiff sought to recover £60 paid to Devereux's secretary for a commission in a regiment. It is only a preliminary application that is reported, the Court of Common Pleas by a majority rejecting the defendant's contention that the action should be dismissed at once as being founded on an illegal transaction.

⁴ 9 Geo. II, c. 30, and 29 Geo. II, c. 17.

⁵ *The Times*, Dec. 23, 1820.

⁶ *Henderson v. Bise*, *The Times*, November 1, 1822. The report in 3 Stark N.P., 158, is short and merely indicates that the statute only applied to British Government stocks.

⁷ Recently, the United States Court of Claims has held that the word "government"

objection as to the legality of such dealings was raised in the Common Pleas, where, early in the following year, a stockbroker recovered the price of some Colombian bonds from a client.¹

Before *Kinder v. Everett*,² the next case to be considered, was heard by Chief Justice Abbott, Lord Eldon had, in *Jones v. Garcia del Rio*,³ expressed his doubts on the subject of actions arising out of contracts with and loans to unrecognized states. Two of the co-defendants in that case were the parties in the present action. The plaintiff, Kinder, was the contractor of a loan to Peru; with the defendants, Messrs. Everett, the bankers to whom the subscriptions had been paid, he had two accounts. In one of these, the "Peruvian Loan Account", there were £5,660 to his credit; in the other, named "State of Peru—Thomas Kinder, agent", £70,000. After a time, the defendants began to dishonour the plaintiff's cheques, on "some scruple raised in their minds as to the legality of the transaction", and "doubts as to the state of affairs between Mr. Kinder and the Peruvian authorities".

When the plaintiff sued to establish his title to the money the question of legality was brought up, but left for future consideration by the Court in case either party should wish to raise it. With regard to the plaintiff's authority, evidence was given by Paroisien and Garcia, "the agents who had negotiated the loan (whom the Court would not allow to be called envoys, as they had not been acknowledged by the British Government)." They showed that they had assented to the plaintiff's proceedings, and described events in Peru—where there had been changes of government—in considerable detail in order to show their own authority.

In summing-up, the Chief Justice said that the plaintiff was clearly entitled to the first sum; as to the second, no one could claim it "unless he had the authority of what might properly be denominated 'the State of Peru' ". The jury found for the plaintiff for both amounts. Early in the next term, the defendants raised the point of the legality of the transaction, and the Court granted a rule *nisi* to show cause why the verdict should not be in § 155 of the Judicial Code only includes "recognized government"—*Russian Volunteer Fleet v. U.S.*, 68 Court of Claims, 32 (reversed by the Supreme Court on another ground, 1931, 228 U.S. 481).

¹ *Van Rossum v. Taylor*, *The Times*, March 7, 1823.

² *The Times*, December 22, 1823. This must be the case referred to by Lord Brougham in *Thompson v. Barclay*, 9 L.J. (O.S.) Ch. 215. His account, indeed, calls it a loan to Mexico, and gives a different sum of money as involved; but these discrepancies are outweighed by his giving the same judge, parties, place of trial, and circumstances of the action, and can be accounted for by the long interval between the two cases.

³ *Turn. and Russ.*, 297.

set aside.¹ Further proceedings do not seem to be reported, but Lord Brougham, in *Thompson v. Barclay*, said that the money was eventually paid.

This is an interesting case, for it was, in effect, an action by the agent of an unrecognized state to recover funds on its behalf. This aspect of the matter, however, does not seem to have troubled the Court at all; the only doubt felt was whether the plaintiff, a British subject, could maintain an action arising out of a loan to such a state. This question was considered by Chief Justice Best in *De Wütz v. Hendricks*,² where he said that no right of action could arise out of "engagements to raise money to support the subjects of a government in amity with our own, in hostilities against their government". In *Hennings v. Rothschild*,³ a case of a loan to Naples where there was no question of assisting a revolution, he went farther, and doubted whether money could lawfully be lent to a foreign prince by an Englishman without the King's leave.

As in *Kinder v. Everett*, governmental acts in an unrecognized state were also investigated in *Revenga v. Mackintosh*.⁴ The plaintiff, a Colombian Envoy and Secretary of State, claimed damages for malicious arrest for debt at the suit of the defendant, an English merchant who had had difficulties in dealings with the Colombian Government.⁵ The plaintiff alleged that his arrest was an attempt by the defendant to bring pressure to bear upon him in respect of contracts with the Colombian Government with which he had had nothing to do. The defence was a denial of malice; the defendant had acted *bona fide* on an opinion given by an eminent special pleader, who had stated that, in the circumstances,

¹ *The Times*, January 27, 1824.

² 2 Bing. 314 (1824)—a case of an alleged loan to the Greek insurgents, which seems to have been a fraud. A similar statement by Lord Eldon was referred to in the judgment.

³ 4 Bing. 315 (1827).

⁴ 2 B. & C. 693; 4 D. & R. 187; *The Times*, April 23 and May 7, 1824. What interested the editors of the law reports referred to was the extent of the protection to such an action given by a special pleader's opinion; other aspects of the case are brought out more fully in *The Times*.

⁵ Messrs. Mackintosh had previously approached the British Government over their claims against Colombia. The King's Advocate (Sir Christopher Robinson), in an opinion dated March 8, 1823, advised that "the Act of the Parties in entering into any Contract on the security of an asserted Independent Political State, or Government, which has not been recognized by His Majesty, was so imprudent and irregular, that they cannot claim protection or support from the interference of H.M.'s Govt., further than it may accord with the general relations of Govt. in other respects" (Law Officer's Reports, Colombia, P.R.O., F.O. 83, 2254). The King's Advocate had also advised that the Government should not interfere over Revenga's arrest (*ibid.*, March 29, 1823).

the Colombian Government was liable on the particular contracts; and, Colombia not being recognized, proceedings could be taken against individual members of its Government. Thus, to show why he had been arrested, the plaintiff had to prove his official position; while to substantiate the defence, it had to be shown that the plaintiff was in fact a member of the Colombian Government, and whether he had been concerned with the contracts in question.¹ Evidence was given on all these points, and the jury found for the plaintiff. Later, the Court refused a rule for a new trial, when Abbott C.J. said that the statement of the law in the opinion was "wrong beyond all question".²

In the cases hitherto considered, while it was admitted that the South American republics were not recognized, the fact of their existence had been given full weight. In *Yrisarri v. Clement*,³ however, an attempt was made to show that they were legally non-existent. The plaintiff, a Chilean envoy, claimed damages for a publication reflecting on his conduct in negotiating a loan for that state. In the declaration his official position was mentioned, and Chile and Buenos Ayres were referred to as states. To this the defence objected, urging that, as these states were not recognized,⁴ the Court could know nothing about them, save as parts of Spain. This contention would have been favourably received by Lord Eldon; Best C.J., however, said that there were three classes of foreign states; first, those acknowledged as sovereign independent states; secondly, states connected with England by existing treaties; and, lastly, sovereign states unacknowledged by the British Government. As to the first two classes, it was necessary to prove the attitude of the British Government, though of that judicial notice would often be taken; as to the third class, evidence was admissible to prove that they were in fact independent states.⁵ This evidence was given, and the plaintiff was

¹ Cf. *Kinder v. Taylor*, 3 L.J. (O.S.) Ch. 68, where, two persons being described in the bill as Peruvian envoys, Lord Eldon said: "If the plaintiff's case were to depend upon the truth of those facts, I should dismiss the bill directly; because His Majesty's Courts of Justice cannot recognize the fact that there was any such thing as a 'Government of Peru'."

² The question of the personal liability of members of South American governments on governmental contracts was argued in the Mayor's Court, in *Hodson v. San Martin and others*. The defendants were members of the Peruvian Government. The Recorder dissolved an attachment that had been obtained on Peruvian funds in London, but on a defect in an affidavit without giving an opinion on the points discussed. (*The Times*, November 23, 1824).

³ 2 C. & P. 223; 11 Moo. C.P. 308. (1825 and 1826.)

⁴ Buenos Ayres had in fact been recognized by this time; but this does not appear in the report.

⁵ The sort of evidence necessary was indicated; for communities to be considered

allowed to put in a document bearing the seal of Chile to show his appointment as envoy. It was also contended that the plaintiff could not maintain the action, as he had been engaged in an illegal transaction. The Chief Justice agreed in this view, but thought that if the words complained of imputed fraud *ultra* that transaction, the plaintiff might recover. The jury having found for the plaintiff, an application was made for a new trial, which was granted, on the ground that a certain innuendo had not been made out. At the same time, however, the Court expressed itself satisfied with the evidence that Chile and Buenos Ayres were states.

III

Summary.

From the cases of which an account has been given above and in my previous article, it can be seen that there was some difference in the views taken by the Courts when they first had to consider unrecognized states. The Courts of Admiralty and of Chancery were in agreement in holding that unrecognized states could not sue or make any claim in legal proceedings, and that the attitude of the British Government to a *de facto* situation was binding on the Courts—"the Courts of the King must act in unison with the Government of the King". It is between the application of this principle by the Court of Chancery, and the attitude of the Common Law Courts that the chief contrast lies. In the Court of Chancery, non-recognition of a state by the British Government meant that its existence could not be in any way admitted by the Court, and parties whose cases depended on that fact could not succeed. Thus, whatever the circumstances, relief was refused to plaintiffs who had lent money to the South American republics, not only because such transactions were illegal as supporting rebellion against a friendly Power, but because it would involve "taking notice" of unrecognized states and their acts; and this general ground was also taken in cases where there was no question of loans.¹

states it must be shown that they are "associations formed for mutual defence, acknowledging no authority *de hors* their own government, observing the rules of justice towards the subjects of other states, living generally under their own laws, and maintaining their independence by their own force". (11 Moo. C.P., at p. 315.)

¹ The Chancery cases were considered in the last volume of this Year Book. Another illustration of Lord Eldon's views, which unfortunately did not come to my notice until after the publication of my previous article, may be found in *Esdale and others v. Campbell*, *The Times*, November 20, 1820. The defendant, being indebted to the plaintiffs for stores supplied, had assigned to them the benefit of sums due to him from

The Common Law Courts, though Chief Justice Best at any rate agreed that such loans were illegal, completely differed from the Court of Chancery with regard to taking the facts into account. For example, the existence of Chile, and its appointment of an envoy; who had the authority of Peru to draw funds in an English bank; whether a given person was a member of the Colombian Government; all these facts could be proved in evidence, and, provided the plaintiff had not been engaged in an illegal transaction, a verdict could be given accordingly. To put it shortly, in the Common Law Courts, while the fact that a given state had not been recognized by the British Government was important in determining the legality of a transaction, it did not debar the judges from finding out the facts and attempting to do justice with regard to them.

IV

Conclusion

The decisions of this period are still of considerable importance, for the later cases are few, and have not made clear how, in a given case, an English Court will deal with the embarrassing factor of an unrecognized state or government. Many questions remain to be solved, of which the most important to the private person is the effect to be given in our courts to the acts of a state or government which has not been recognized by this country. It has, indeed, been held that no validity will be given to acts of confiscation;¹ but whether this is a special case, or an application of a general rule, is not certain, and may one day have to be determined. In the interests of justice, it is desirable that our courts should follow the tendency of the recent American cases,² and give effect to acts

the Government of Venezuela. Lord Eldon dismissed the plaintiffs' motion for a writ of *ne exeat regno*, observing: "You call the transaction the assignment of some debt due by some Government; but can I admit, sitting here, that there is such a Government on the face of the earth? There is another question of very great importance, namely—whether this Court, as long as a Government is not acknowledged by this country, can take notice of contracts entered into between British subjects and the Government not so acknowledged. . . . This is an assignment of debts due by the Government of Venezuela; and I repeat that I cannot interfere unless as a judge I am authorized to recognize that Government."

¹ *Luther v. Sagor and Co.* [1921] 1 K.B. 456, 3 K.B. 532. The decision of Roche J. was reversed because, in the meantime, the Soviet Government had been recognized; its correctness was not questioned.

² The recent cases are reviewed by Dickinson, in "Recognition Cases, 1925-30", *A.J.I.L.*, 1931, p. 214.

upon which the rights of the parties depend.¹ This would, indeed, involve the abandonment of the uncompromising attitude taken in the early decisions of the Court of Chancery. Last year, the writer attempted to show that the basis of this attitude was questionable; in the present article, he hopes to have shown that a broader view is not destitute of authority.

¹ Sir John Fischer Williams considers it improbable that our courts would refuse to do so (*Grotius Society Transactions*, XV, pp. 74-5).

RECIPROCITY IN REGARD TO FOREIGN JUDGMENTS

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THE extent of the recognition to be afforded in one country to judgments pronounced by the courts of another country is one of the most baffling and delicate problems which arise in Private International Law. The literary output dealing with it is immense¹ and some justification would, therefore, seem to be required for any further exploration of ground which is already covered by a mass of theses and monographs in all the European languages. An excuse may perhaps be found in the fact that the bearing on this question of the difference between Anglo-American and Continental legal thought is, as yet, imperfectly understood on both sides of the Channel, with the result that a situation has arisen which, not infrequently, creates a good deal of unnecessary friction in the world of commerce. The inconvenience involved is manifest. Nothing can be imagined which is more galling to a man of business who has obtained a judgment in his own courts, than to discover that his debtor has sought refuge, in company with all his assets, in some foreign country, and that the judgment which has been obtained at such great trouble and expense is, therefore, not worth the paper on which it is written. This, though not universally true, does, in fact, represent the position in a very large number of cases, and it is, therefore, not surprising that we find repeated demands from Chambers of Commerce and other business organizations for a radical change in the laws which have brought this state of affairs into being. Cases also occur of a non-commercial character. For instance, the foreign owner of a motor-car may fail to satisfy a judgment recovered from him for damages for personal injuries due to his negligent driving. He can easily leave the country and, as matters now stand, the unfortunate victim is often without a remedy.²

The grievance is one which has often been discussed by inter-

¹ There is a lengthy bibliography in *Répertoire de Droit International* by Lapradelle and Niboyet, which is, however, incomplete so far as German and English and American publications are concerned.

² This question has assumed an acute form in North America. See "International Aspects of Automobile Safety Responsibility Laws" by Hon. R. Leighton Foster, *Insurance Claim Journal*, Vol. II, p. 5. There appears to be scope for the settlement of this difficulty through international action by the European states.

national assemblies of lawyers,¹ and it has also been placed on the agenda of the International Congress of Comparative Law to be held at The Hague in August of this year. Proposals have been submitted for the unification of the rules of Private International Law which deal with the question, but the result does not appear to be such as to provide much encouragement to the advocates of uniformity.² On the other hand, a certain measure of success has been reached by the attempt to solve the problem by the negotiation of separate treaties between individual countries.³

Reciprocity presents a twofold aspect. It raises the question of reciprocal enforcement, which is the most important matter, but it also involves a consideration of the very complicated problem of the recognition of foreign judgments by way of *res judicata*. It is proposed to deal with these questions separately though they are unavoidably linked to one another to a certain extent. So far as the topic of enforcement is concerned it is proposed to confine the discussion of it to the case of judgments *in personam* which direct a sum of money to be paid to the successful party. An extension to other judgments is theoretically possible, but is hardly within the realm of practical politics from an international point of view.

Finally it is proposed to refrain from a consideration of these questions as they affect the British Commonwealth of Nations, a matter which is dealt with by the Administration of Justice Act, 1920. This will simplify the issue, and will focus the discussion on

¹ e.g. by the Institut de Droit International, and by the International Law Association on many occasions. For details of the debates and draft proposals see the historical *résumé* in the reports presented at The Hague Conference of the International Law Association in 1921 (*30th Report*, Vol. I, p. 354) and at the Stockholm Conference in 1924 of the same body (*33rd Report*, p. 147).

² A draft Convention was adopted by the Diplomatic Conference at The Hague in 1925, but no action appears to have been taken to secure its ratification. (For the text of this Convention, see Niboyet, *Manuel de Droit International Privé*, p. 969.) The Hague Convention of 1905 on Civil Procedure, Article 19, deals with the enforcement of judgments for costs, but only as a measure which is ancillary to Articles 17 and 18 of the Convention, which dispense with the requirement of security for costs in the case of foreign plaintiffs. (See the text of this Convention in Magnus, *Tabellen zum Internationalen Recht (Zivilprozessrecht)*, p. 161.) Certain international conventions dealing with specific matters provide for the reciprocal enforcement of judgments coming within the ambit of their subject, e.g. The Elbe Convention of 1922 and the Berne Railway Convention of 1924.

³ For details see *Répertoire de Droit International*, Lapradelle and Niboyet, Vol. VI, where the matter is treated under the headings of the different countries. No such treaty has, at the moment of writing, been entered into by Great Britain and Northern Ireland, but the matter is regulated by statute in the case of the British Commonwealth of Nations. (Administration of Justice Act, 1920, Part II.)

those questions which are of the most urgent importance at the moment.

I

The Reciprocal Enforcement of Judgments

Mention has already been made of the fact that the different countries vary very considerably in their attitude towards this question. It is possible, however, to group them according to the degree of recognition which is granted to foreign judgments by their territorial courts.¹

(A) The first group comprises such countries as refuse, in principle, to give any effect to a foreign judgment. It includes Sweden,² Holland,³ and Soviet Russia.⁴

(B) Other countries, whilst admitting the right to recognition and enforcement, only do so in theory and virtually deny it in practice. These countries are numerous, but are represented by France and Belgium. Italy, as will appear hereafter, occupies an intermediate position.

(C) The third group of countries is composed of those which, in principle, recognize foreign judgments, but hedge the concession round with so many conditions and exceptions that recognition is only granted, in the absence of treaty rights, to the judgments of a very limited number of countries. This group is represented by Germany, but it also includes certain other countries, such as Switzerland and Roumania.

(D) The position in the countries governed by Anglo-American law is of a somewhat special character. Theoretically there is no definite recognition by these countries of foreign judgments as such, but in practice it is far more easy to secure enforcement in England and the United States than it is elsewhere.⁵ Statute law, except in the case of the British Commonwealth of Nations,

¹ It is extremely difficult, if not impossible, to obtain reliable information as to the position in a large number of countries. This illustrates the wisdom of a policy of caution in relation to a policy of unification.

² See the speech of M. Rohde, Legal Adviser to the Swedish Ministry of Foreign Affairs, *33rd Report of the International Law Association*, p. 194.

³ Code of Civil Procedure, Articles 431 and 436; *Week blad van het Recht*, January 31, 1902 (Court of Cassation).

⁴ This is believed to be so, but definite information is lacking.

⁵ "Foreign judgment" here means the judgment of a non-British court. Judgments of British Overseas courts are covered by the provisions of Part II of the Administration of Justice Act, 1920, so far as reciprocal enforcement between members of the British Commonwealth of Nations is concerned.

plays no part in the matter. Recognition is based on the common law principle enunciated by Dicey¹ that "any right which has been duly acquired under the law of any civilized country is recognized and, in general, enforced by English courts". It follows, therefore, that if effect is given to a foreign judgment by an English court, it is not the foreign judgment which is enforced, but the right acquired under such judgment.²

Running parallel to this theory of an acquired right is the fiction that the judgment of a competent court for a sum of money creates an implied contract to pay such sum, or in other words gives rise to a quasi-contractual obligation.³ It may be doubted whether the right to sue on a foreign judgment rests upon this fiction. An obligation to pay the amount of a foreign judgment *in personam* would seem to be created, but its quasi-contractual nature has been disputed.⁴ Further, it is difficult to reconcile the existence of a debt in such a case with the rule of English law which denies the possibility of a merger of a cause of action in a foreign judgment, a rule to which further reference will be made hereafter. It is probably more correct to say with Lord Blackburn that the judgment of a foreign court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given and that the courts in this country are bound to enforce it.⁵ It is, however, unnecessary to pursue this question, because these theories are not inconsistent except in an academic sense. The doctrine of an "acquired right" explains the reason for the enforcement of a foreign judgment, and the theory of the nature of the right, whether it be based on quasi-contractual liability or on general principles of Private

¹ *Conflict of Laws* (4th ed.), p. 19.

² The earlier English theory was that the Comity of Nations required the enforcement of foreign judgments; *per* Lord Ellenborough in *Power v. Whitmore* (1815), 4 M. and S. 150. See also *Castrique v. Imrie* (1870), L.R. 4 H.L., at p. 439; *Messina v. Petrocchino* (1872), L.R. 4 P.C. *per* Sir Robert Phillimore, at p. 157. For a criticism of this theory see Dicey, *op. cit.*, p. 9.

³ *Godard v. Gray* (1870), L.R. 6 Q.B. 139. See also Jenks, *Digest of Civil Law*, § 716; *Laws of England* (Halsbury edition), Vol. VI, *sub tit.* "Conflict of Laws", § 417.

⁴ Winfield, *The Province of the Law of Tort*, p. 150.

⁵ *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. *per* Blackburn J., at p. 159. Cf. the statement of Lindley L.J. in *Nouvion v. Freeman* (1887), 37 Ch.D., at p. 256: "The principle on which an action can be brought on a foreign judgment is that the rights of the parties have already been investigated and determined by a competent tribunal. . . . The judgment is treated as *res judicata*, and as giving rise to a new and independent obligation which it is just and expedient to recognize and enforce." N.B. This statement, in so far as it suggests that a foreign judgment is to be treated as *res judicata*, appears to be open to doubt. See the discussion of this question *infra*.

International Law, indicates the character of the procedural method for its enforcement.

Some foreign writers point to the fact that an action must be brought to enforce the judgment, as proof of the non-recognition by English courts of the judgments of foreign tribunals.¹ Theoretically there may be something to be said for this view. Continental jurists, who think in terms of an *exequatur* rather than of an action on the judgment, can hardly be blamed if they draw this conclusion from the fact that the judgment which is ultimately enforced in England is an English judgment and not that of the foreign court. But this view of the matter loses all practical importance if it is borne in mind that the successful party in a foreign action is not, with certain rare exceptions, required to prove his case all over again in England. It may be true, to some slight extent, that the method of proceeding by action may lead to delay. Sir F. T. Piggott has mentioned one instance in which an action of this nature lingered on for more than four years.² Such cases are nevertheless very unusual. In a normal case where judgment has been given abroad for the payment of money it is the practice to issue a specially endorsed writ and to apply for summary judgment.³ The application is supported by an affidavit which exhibits a certified copy of the foreign judgment, and the debtor will not be allowed to defend the action unless he can testify on oath to the existence of one or more of the following defences:

(a) That the foreign court had no jurisdiction in the international sense. Questions of domestic competence are disregarded.

(b) That the judgment of the foreign court is tainted with fraud⁴ on the part either of a litigant or of the foreign court.

(c) That the foreign judgment sued on is not a final judgment, i.e. is merely interlocutory in character.

(d) That the proceedings in the foreign action were contrary to natural justice, which in practice means that the judgment debtor was not given adequate time in which to appear and lodge a defence to the claim.⁵

(e) That the subject matter of the action was of such a nature

¹ e.g. Foigniet, *Droit International Privé*, p. 332.

² *Law Quarterly Review*, Vol. XXXVIII, at p. 341.

³ *Grant v. Easton* (1883), 13 Q.B.D. 302; Rules of the Supreme Court, Order III, rule 6, and Order XIV. See Ball and Watmough, *Annual Practice*, 1932, p. 21.

⁴ *Codd v. Delap* (1905), 92 L.T. 510; but cf. *Jeannot v. Fuerst* (1909), 100 L.T. 816, a case which shows the reluctance of the English courts to refuse enforcement on this ground.

⁵ See the notes to Order III, rule 6, in the *Annual Practice*, *loc. cit.*, for a detailed discussion of this question which is the one arising most frequently in practice.

that it would be against the policy of English law to recognize the foreign judgment.¹

In the great majority of cases the result is that the foreign judgment creditor obtains an English judgment within a very brief space of time and at a very small cost. It will be observed that the judgment debtor is not permitted to challenge the foreign judgment on the ground that it is incorrect either on the facts or on the law. The English court will not rehear the case.² Master Valentine Ball, who has a first-hand knowledge of the circumstances in which actions are brought in England on foreign judgments, says, speaking of summary proceedings under Order XIV:

“Probably hundreds of foreign judgments are enforced in this way during the year; and one may be permitted to wonder whether it is as easy to get an English judgment satisfied in any European country as it is to recover on a judgment under our summary procedure.”³

The answer to the query of the learned Master is in the negative, and our next step must therefore be to show that reciprocal treatment is not, as a general rule, afforded to English judgments by foreign courts; and to ascertain, if possible, the reasons for such want of reciprocity. It is not feasible to compile anything approaching to a complete comparative statement in the present article. This is not owing merely to the exigencies of space, but because the material is lacking, at present, for a complete synoptic view of the situation. It is proposed, therefore, to examine it only in relation to the law of certain countries which may be regarded as the most important in a juridical sense because they are typical of the great legal systems of the world.⁴

France: The position as regards the enforcement of foreign judgments in France is somewhat indefinite owing to the varying attitude taken up by the courts on this question. No foreign judgment can be enforced in France unless it is confirmed by the *exequatur* of a French court,⁵ and the grounds on which the courts have acted in granting or refusing an *exequatur* have fluctuated so much that it is very difficult to deduce any guiding principle from the decisions which have been reported. Four different theories have been advanced at various times. According to the

¹ See, for instance, *Re Macartney*, [1921] 1 Ch. 522.

² This is so even where the foreign judgment is based on a manifest error of English law. *Godard v. Gray* (1870), L.R. 6 Q.B. 139.

³ *The Enforcement of Foreign Judgments*, by W. Valentine Ball, 1928.

⁴ The question of “*res judicata*” which presents considerable difficulty is reserved for separate discussion *infra*.

⁵ *Code of Civil Procedure*, Art. 546, and *Code Civil*, Art. 2123.

first theory, which has never found favour and which may be regarded as exploded, a distinction was to be drawn between foreign judgments against French nationals and those against citizens or subjects of foreign states, and only the latter were to be recognized and enforced.¹ The second theory is that foreign judgments must be treated as conclusive and must be enforced without examination provided that they emanate from a competent court and do not offend against the French views of *ordre public*. The French courts have definitely rejected this view of the matter.² The third theory is known as that of revision, i.e. the whole case is reopened and the French court substitutes for a foreign judgment a judgment of its own. This solution has been condemned on all hands by French doctrinal writers.³ The fourth system may be described as that of control, i.e. the French court reopens the case, but merely does so in order to ascertain whether the foreign judgment accords with the principles of justice (*n'est pas infectée d'injustice évidente*). This means in effect that errors of fact or of law will be disregarded unless they are such as to lead manifestly to grave injustice. M. Niboyet, who strongly supports this theory, compares the functions of the French courts in this respect with those of a custom house. It is their duty, in his view, to prevent the enforcement in France of judgments coming from abroad which are tainted with injustice. According to this theory, which is the one which appears to be most widely held and applied by the French tribunals, an *exequatur* may be refused, but the court has no power to vary the foreign judgment or to substitute for it a judgment of its own.⁴

The fact remains, however, that there is no constant practice, and that, in the existing state of the law, a French court can do what it likes when it is a question of the enforcement of a foreign judgment. In these circumstances one turns away, not unnaturally, from the text-books and the reported decisions to an examination of the present system as it works out in practice. Inquiries made in reliable quarters have revealed the following situation.

A French court must, in the first place, be satisfied that a foreign judgment conforms to the following requirements:

¹ This theory was based on the provisions of an Ordonnance of 1629 which appears, however, to have been repealed by implication by the *Code Civil*.

² See Sirey, 1865, 2. 60.

³ Niboyet, *Manuel de Droit International Privé*, p. 944; Lerebours-Pigeonnière, *Précis de Droit International Privé*, § 327.

⁴ Niboyet, *ibid.*, 945; Lerebours-Pigeonnière, *ibid.*, § 327; Weiss, *op. cit.*, p. 669. See also D.P. 1913, 2. 140; D.H. 1925, 4-20.

1. The judgment must be a valid one in its country of origin. It must be *exécutoire*, i.e. capable of being enforced at once,¹ and must possess the authority of *res judicata*.

2. It must emanate from a court which is competent, i.e. competent according to the French rules of the conflict of laws. In this connexion the effect of Article 15 of the *Code Civil* must be mentioned. It is there provided that a French national may be sued in a French court in respect of obligations incurred by him in a foreign country. This has been construed by the French courts to mean that a Frenchman is entitled to claim that his case shall be tried in a French court and in no other. The result is that a default judgment obtained in a foreign court against a French national can never be enforced by *exequatur* in France unless the debtor has expressly or impliedly submitted to the jurisdiction of the foreign court, or has waived the benefit of Article 15 by agreement.²

3. The foreign court must have applied that system of law which is prescribed by the French rules of the *Conflict of Laws*.³ For instance, a Polish court decides a question of succession by applying the national law of the *de cuius*. French law would regard the matter as being governed by the *lex loci rei sitae*. The Polish judgment cannot be enforced in France.⁴ There is a faint echo of this rule in an English case, *Simpson v. Fogo*,⁵ but it has in reality never found its way into our Common Law.

4. The judgment must not violate the French view of *ordre public*. This is a very elastic term, which includes public policy, as we understand it; irregularities in procedure;⁶ concurrent proceedings in several jurisdictions,⁷ and a great deal more besides. For instance a German judgment has been held to be against *ordre public* because the German judges in stating their conclusions made certain rather ungallant remarks with respect to the women folk of France.⁸

If the foreign judgment survives this ordeal and the case is not covered by an International Convention, the French court proceeds to reopen the matter with a view to the determination of

¹ See Clunet, 1926, p. 952.

² See Niboyet, *op. cit.*, p. 892; Weiss, *op. cit.*, p. 643. ³ Niboyet, *op. cit.*, p. 931.

⁴ For a case in which this rule was applied to an English judgment see Clunet, 1890, p. 870.

⁵ (1860), 1 J & H. 18; (1863), 1 H & M. 195.

⁶ Clunet, 1909, p. 137.

⁷ *Ibid.*, 1913, p. 922.

⁸ Niboyet, *op. cit.*, p. 935, Clunet, 1923, p. 295. See *Law Quarterly Review*, Vol. XXXVII, p. 315 (Public Order, by Wyndham A. Bewes), for a discussion of the concept of *ordre public*.

the further question whether it creates any hardship or other form of injustice. The result of all this, in practice, is that the foreign judgment creditor gains nothing by applying for an *exequatur*. In the majority of cases he will act wisely in starting the proceedings afresh in a French court instead of throwing money away in a fruitless attempt to obtain an *exequatur*. It would be going too far, however, to say that foreign judgments *in personam* are ignored by the French courts. They are treated as valid, without revision, for a certain purpose, i.e. that of a *saisie conservatoire*, a process by which the foreign judgment creditor becomes entitled to attach the debtor's property in France by way of security.¹ It is nevertheless quite clear that no useful purpose is served as a rule by endeavouring to enforce an English judgment in France. The difficulty cannot be surmounted by an express or implied agreement by which the defendant waives his right to a revision of an English judgment. In a recent case heard before the Civil Tribunal of the Seine, the court held that the duty of a French court to go behind a foreign judgment and reopen the case was a question of *ordre public* and, therefore, could not be renounced. Consequently, even a consent judgment given in England against a French defendant is of no value in France.² It may be added in conclusion that France has entered into several conventions with other countries for the reciprocal enforcement of judgments. These conventions vary so much that it is impossible to consider them here in detail.³

Belgium: The rules of Belgian law are in substance the same as those of French law. Unless there is a convention with the country from which a foreign judgment emanates, the Belgian courts must rehear the case.⁴

Germany: Foreign judgments are enforced in Germany by proceedings in the nature of an *exequatur*, but before this can be done the following requirements must be satisfied:⁵

¹ *Revue de Droit International Privé*, 1912, p. 748.

² See the extract from this judgment of the French court in *Solicitors' Journal*, Vol. 72, at p. 578.

³ See Lapradelle and Niboyet, *Répertoire de Droit International*, for details. None of these treaties can be regarded, for various reasons, as furnishing a model for other countries. Many of them were concluded a long time ago. The most recent of them is the Franco-Italian Convention of 1931; see *Revue de Droit International Privé*, 1931, p. 625.

⁴ Article 546 of the Belgian Code of Civil Procedure; *Bulletin de l'Institut Belge de droit comparé*, 1928, p. 18; Ball, *The Enforcement of Foreign Judgments*.

⁵ Code of Civil Procedure (*Zivilprozess Ordnung*), Art. 328. This code will be referred to hereafter as *Z.P.O.*

(a) The judgment must emanate from a competent court.¹

(b) If the defendant is a German he must have been served in person with the writ in the foreign action.

(c) The judgment, if it relates to certain questions, e.g. capacity, marriage, divorce, adoption, legitimacy, will not be enforced in the case of German nationals, unless it accords with the provisions of German law.²

(d) A foreign judgment will not be enforced if it is *contra bonos mores* or against the object (*Zweck*) of a German law.³ It will be *contra bonos mores* if it is repugnant to the "general national conscience" (*Volksbewusstsein*) of the German people.⁴ It is rather difficult to say what this connotes, or what is meant by repugnance to the "object" of a German law, but the rule postulates a conflict between the rules of law applied in the foreign judgment and some principle of German law which is regarded as fundamental, because it relates to the moral, social, economic, or political bases of national life in the German Reich.⁵

(e) Finally, and this is the most important requirement of all, the courts of the foreign country in which the judgment was given must grant reciprocity of treatment.⁶ "Reciprocity" in the sense in which it is used here calls for some explanation. The reciprocal treatment in the foreign country must rest on a rule of law and not on some practice or usage of the courts,⁷ but it need not be identical in all respects to the treatment afforded in Germany so long as it is the same in substance.⁸ It would also seem that there cannot be reciprocity if the courts of the foreign country claim a

¹ This means generally competent in the same sense as in English law, i.e. any court, whatever its precise nature may be, can be competent and it is not necessary to show that it is competent *ratione materiae et ratione loci*. Cf. *Vanquelin v. Bouard* (1863), 15 C.B. (N.S.) 341.

² Z.P.O., Art. 328 (3); Law of 1896, introducing the Civil Code (*Einführungsgesetz*) Articles 13 and 27.

³ Z.P.O., Art. 328 (4).

⁴ See *Law Quarterly Review*, Vol. XLVII, at p. 208, for a discussion of the German view of *boni mores*. For the present purpose it covers "natural justice" and "public policy" as we understand them. See further Stein-Jonas, *Commentary on the Z.P.O.*, Vol. I, at p. 971.

⁵ See Krauss, *De l'effet international en Allemagne des jugements étrangers*, Clunet, 1931, p. 66. Evidence external to the contents of the judgment is not admissible for the purpose of attacking its validity on either of the above grounds. *Reichsgerichts Entscheidungen in Zivilsachen* (R.G.E.), Vol. 72, p. 124, and generally see *ibid.*, Vol. 82, p. 31; Vol. 83, p. 112; and Vol. 114, p. 172.

⁶ Z.P.O., Art. 328 (5). Reciprocity is not necessary where the judgment is not for a sum of money, and the case is one which no German court was competent to decide.

⁷ R.G.E., Vol. 70, p. 438; Vol. 107, p. 308.

⁸ *Ibid.*, Vol. 70, p. 434.

wider jurisdiction over foreigners than is claimed by the German courts.¹

The procedure on enforcement does not call for detailed discussion.² The German court must satisfy itself that the above-mentioned requirements are complied with, and, if this is so, the *exequatur* is granted without any further examination of the foreign judgment. The German law is, in fact, much more rigid than our own in its respect for the decisions of foreign courts. It excludes not only a revision of a case on its merits, but it will not even permit a judgment to be challenged on the ground of fraud.³

The all-important feature of the German rules is, of course, the requirement of reciprocity. Each legal system has, at present, its own theory of the enforceability of foreign judgments, and its own safeguards designed to obviate any possibility that the judicial machinery of the state might be used to give effect to a foreign judgment which is out of harmony with the national conception of justice. In these circumstances it is not surprising that reciprocity only exists *in vacuo* apart from treaty rights and that although the German courts have shown no hostility towards the idea of reciprocal enforcement, they are precluded by the nature of the law which they have to administer from giving effect to foreign judgments in a great majority of cases, unless the foreign judgment is covered by a Convention.⁴

It is on the ground of want of reciprocity that the enforcement of an English judgment is impossible in Germany. The question was investigated with great impartiality and thoroughness by the Reichsgericht in 1882,⁵ and its decision that reciprocity does not exist has since been followed by the German courts. The ground for that decision appears to be, in substance, that reciprocity is not assured owing to the fact that it is possible for a German judgment to be attacked in an English court on the ground of fraud. An additional reason given was that the English courts will not recognize a German judgment which is based solely on the existence of some rule of prescription. This second ground, however, is open to criticism as it is not clear that the Reichsgericht was accurately informed as to the distinction drawn by the English law between the extinction of a right by the lapse of time, and the

¹ Krauss, *op. cit.*

² Z.P.O., Arts. 722, 723.

³ Z.P.O., Arts. 579, 580. See Kahn, "English Judgments *in personam* and *in rem* in Germany", *Journal of the Society of Comparative Legislation* (3rd Series), Vol. IX, at p. 217.

⁴ See Magnus, *Tabellen zum Internationalen Recht, Zivilprozessrecht*, which gives a synoptic view of the matter.

⁵ R.G.E., Vol. 7, p. 412.

barring of a right of action under the English Statutes of Limitation.¹ Moreover a plea of fraud is very rarely raised in these cases in England, and when raised it is investigated with minute care. It seems regrettable therefore that reciprocal enforcement should, in the case of Germany, be prevented by what is, in effect, not a very substantial difference between the two systems.²

Italy: The main provisions of Italian law are of exemplary liberality, but unfortunately their effect has been destroyed to a large extent by recent legislation, which owes its existence to the fact that the generous gesture which was evidenced by the earlier law met with little or no response in other countries. Article 941 of the Italian *Code of Civil Procedure* provided that an *exequatur* should be granted to a foreign judgment after it had been submitted to a process of examination known as *delibazione*. The judgment was examined solely for the purpose of ascertaining: (1) the competence of the foreign court, (2) the regularity of the procedure leading up to judgment, and (3) the absence of anything which would make the enforcement of the judgment repugnant to the notion of *ordre public* or of Italian public law. Apart from this there was no review of the foreign judgment; reciprocity was not demanded and an *exequatur* could only be refused on the above-mentioned grounds. By a law of May 28, 1925, a number of changes were introduced, only one of which need concern us here because of its decisive character. Article 3 of this law provides that where judgment has been obtained by default in a foreign country it shall not be enforced in Italy. All that a contumacious defendant need do, therefore, is to ignore the proceedings in the foreign court, in which event he can snap his fingers at any judgment which it may give against him.³

II

The Recognition of Foreign Judgments

It seems to be doubtful whether it is technically correct to say of a foreign judgment, when raised by way of defence in an English

¹ Dicey, 4th edition, pp. 570, 571. Cf. R.G.E., Vol. 7, at p. 415.

² See the very careful examination of the existing situation by Dr. Kahn in *op. cit.*; and also Frankenstein, *Internationales Privatrecht*, Vol. I, p. 337; Lachs, *Juristische Wochenschrift*, 1929, p. 3452. How reluctant the English courts are to hold that a foreign judgment is tainted with fraud is shown by the case of *Jeannot v. Fuerst* (1909), 100 L.T. 816, where the English court enforced a French judgment though based on a finding of fact by a referee who was related by marriage to the plaintiff.

³ See Diena, *Sur l'exécution des jugements étrangers en Italie*, Clunet, 1922, p. 19.

action, that it possesses the quality of *res judicata*.¹ Unlike the judgment of an English court it does not merge the original cause of action,² and the foreign judgment creditor always has the option of suing either on the original cause of action or on the judgment. Strictly speaking, it would, therefore, appear to be inaccurate to say that it operates as *res judicata*.³ It can hardly be regarded as an estoppel, and it is, perhaps, best to treat it as creating a presumption, based on the principles of Private International Law, that it is binding on the party against whom it was given, unless he can set up one of the objections to it which furnish grounds for leave to defend in summary proceedings under Order XIV on a foreign judgment. In any event it would seem to be sufficient to base this passive or defensive aspect of a foreign judgment on the general principle of *nemo debet bis vexari pro eadem causa*.⁴

The effect in English law of a foreign judgment when pleaded by way of defence can be stated in a summarized form as follows. A valid foreign judgment cannot be examined on the merits, and can only be impeached on the grounds which have already been mentioned. It follows therefore that the judgment of a competent foreign court on the merits⁵ is, in normal circumstances, a complete answer to an identical action brought by the unsuccessful party in the English courts, i.e. if it relates to the same subject matter and claims the same relief.⁶ If it is a judgment *in rem* it will be treated as conclusive against the whole world; if it is a judgment *in personam* it will be a conclusive defence in the second action between the same parties. So also if a party has recovered judgment in a foreign court, and has obtained satisfaction, he will not be permitted to sue again in England.⁷

There is, however, a further question, namely, what is the meaning of the word "conclusive" when it is employed in this context? Does it merely amount to an assertion that the question

¹ It was so treated by Lord Campbell in *Ricardo v. Garcias* (1845), 12 Cl. & F., at p. 481. See also Spencer Bower, *Res Judicata*, at p. 38; Everest, *Law of Estoppel*, at p. 32.

² *Hall v. Odbor* (1809), 11 East. 118; *Bank of Australasia v. Harding* (1850), 9 C.B. 661.

³ Westlake, *Private International Law*, 7th ed., p. 413. *Bank of Australasia v. Nias* (1851), 16 Q.B., at p. 738.

⁴ Bovill C.J. in *Ellis v. M'Henry*, L.R. 6 C.P., at p. 239, refers to another maxim (*ne lites immortales essent dum litigantes mortales sunt*).

⁵ *Harris v. Quine* (1869), L.R. 4 Q.B. 653. The fact that an action had been dismissed as out of time by a Manx Court was not held to bar subsequent proceedings in England. See also *Re Low*, [1894] 1 Ch., at p. 162, *per* Davey L.J.

⁶ *Callandar v. Dittrich* (1842), 4 M. and G. 68.

⁷ *Taylor v. Hollard*, [1902] 1 K.B. 676.

decided by the foreign court cannot be reopened? Or does it bear a wider meaning, so that it not only extends to the decision itself but also to all questions of law and of fact which were raised in the foreign action? Then again, is the effect of the estoppel, or whatever one may like to call it, limited to the action in which the judgment was given, or does it extend to similar questions raised between the parties in other actions? Does "conclusive" bear a special meaning when applied to foreign judgments, or must it be interpreted in the light of case law dealing with English judgments?

These problems appear to have been ignored by the text-book writers. Dicey, when he speaks of a foreign judgment as "conclusive"¹ is in reality dealing solely with the question whether the judgment is examinable on the merits if an action is brought on it in England. Westlake² and Foote³ only touch the fringes of the subject. Even if it is assumed that there is no difference between an English and a foreign judgment which, for reasons already given, seems to be incorrect,⁴ the English decisions on estoppel by record are not altogether clear. It has been said that the conclusive nature of a judgment extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision of the court;⁵ that it covers every point which properly belongs to the subject of litigation;⁶ but that it will not extend to collateral matters⁷ or to anything which is "incidentally cognizable".⁸ Lord Blackburn crystallized the problem when he said that a foreign judgment is in an English court not conclusive as to anything but the point which has been decided.⁹

The difficulty is that it is not always easy to determine which of the many points in a case is to be treated as a fundamental point, in the sense that it is the basis of the judgment. What are we to understand, moreover, by the use of such terms as "collateral" and "incidentally cognizable"? So far as there is direct authority on the matter it would seem to be open to doubt

¹ Rule 112, Dicey, *Conflict of Laws* (4th ed.), p. 449. Cf. Rule 115.

² *Private International Law* (7th ed.), pp. 414-15.

³ *Ibid.* (5th ed.), Ch. XI.

⁴ But see *Ricardo v. Garcias* (1845), 12 Cl. & F. 368; *Société Générale v. Dreyfus* (1887), 37 Ch.D. 215; *The Greifswald* (1859), Sw. 430.

⁵ *Hoystead v. Commissioner of Taxation*, [1926] A.C., at p. 170.

⁶ *Henderson v. Henderson* (1840), 3 Hare, at p. 114.

⁷ *Duchess of Kingston's Case* (1776), 20 St. Tr. 537.

⁸ *Hood-Barrs v. Jackson* (1842), 1 Y. & C. Ch.Cas., at p. 597.

⁹ *Castrique v. Imrie* (1870), L.R. 4 H.L. 414.

whether the facts of a dispute come within the ambit of the doctrine of *res judicata*. One view is that taken by Knight Bruce V.C. in *Hood-Barrs v. Jackson*¹ that "however essential the establishment of particular facts may be to the soundness of a judicial decision . . . and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose". On the other hand we find it stated that a judgment will extend to every point properly belonging to the subject of litigation which could have been brought forward by the parties in the action if they had used reasonable diligence.² In *Outram v. Motewood*³ which was an action for trespass to land it was laid down that if a verdict be found on any fact or title distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties.

Taking all these factors into consideration it would appear to be advisable to treat a foreign judgment as merely conclusive of the immediate and direct object of the litigation, and not to treat it as an estoppel or to apply the principle of *transit in rem judicatam* to all matters of law or of fact which were put in issue. There does not appear to be any difference between judgments *in rem* and judgments *in personam* in this respect.⁴

A further question which may arise is whether the doctrine of *res judicata* applies to any matter which could have been brought forward in the foreign action but was, in fact, not put in issue. The answer to this is that if a defendant has had the opportunity of raising a point in the action but did not do so he will be precluded from relying on it as an answer to a plea of *res judicata*.⁵ On the other hand, a plaintiff who has had several

¹ *Hood-Barrs v. Jackson*, *supra*, at p. 597, reversed *sub nomine Barrs v. Jackson* (1845), 1 Ph. 582, though apparently on other grounds. This statement of the law was approved by Lord Selborne in *R. v. Hutchings* (1880), 6 Q.B.D., at p. 304. It is in conflict with a number of other rulings on the matter, e.g. *R. v. Hartington Middle Quarter* (1855), 4 E. & B. 780; and see *Wakefield Corporation v. Cooke*, [1903] 1 K.B. 417, where Vaughan Williams L.J. appears to consider Lord Selborne's view in *R. v. Hutchings*, *supra*, to have been *obiter dictum*.

² *Henderson v. Henderson*, *supra*, approved by the Privy Council in *Hoystead v. Commissioner of Taxation*, *supra*. Cf. *Ballantyne v. Mackinnon*, [1896] 2 Q.B. 455; *Re Bank of Hindustan*; *Alison's Case* (1873), 9 Ch. App. 1, 25.

³ (1803), 3 East. 346.

⁴ *Per A.L. Smith L.J. in Ballantyne v. Mackinnon*, [1896] 2 Q.B., at p. 463; cf. *Castrique v. Imrie*, *supra*. A judgment *in rem* may be evidence of status, even in proceedings which are not *inter partes*. *Hill v. Clifford*, [1907] 2 Ch. 236.

⁵ *Humphries v. Humphries*, [1910] 1 K.B. 796; [1910] 2 K.B. 531. It will be

causes of action is not compelled to sue on all of them at the same time even though they arise in respect of the same circumstances. Thus in *Brunsdon v. Humphrey*¹ it was held that a person was entitled to bring two successive actions in respect of damage to his vehicle and personal injuries occasioned by the negligence of the defendant's servant, the court being of the opinion that there were two distinct causes of action. The unsuccessful party in a foreign court is moreover not debarred from suing again in England for a different form of relief.²

It would therefore seem that effect will be given in England to a valid foreign judgment if it is pleaded by way of defence to an identical action brought in the English courts, though the precise extent to which such defence will be operative is, perhaps, not altogether clear.

The rules of other systems of law which deal with what English lawyers term estoppel by record derive their origin from the *exceptio rei judicatae* of Roman law, but these rules are only applied to the judgments of the national courts. The French law is uncertain as to the precise effect to be given to a foreign judgment as a defence. A valid foreign judgment is admissible in a French court as evidence and is regarded as cogent evidence of the existence or non-existence, as the case may be, of any right or fundamental fact adjudicated on by the foreign court, but it is only if it has been clothed with an *exequatur* that it has any conclusive force.³ Otherwise it does not even operate to shift the burden of proof from the shoulders of one party to those of the other.⁴ There are signs, however, of a movement away from this very narrow view of the effect of a valid foreign judgment. M. Bartin has called attention⁵ to the tendency of the French courts to give effect to the conclusions arrived at by a foreign court without any investigation of the merits in cases where the foreign judgment is raised by way of defence.⁶ But as matters stand, it would seem that a foreign judgment cannot be relied on

otherwise if a new fact is discovered (*res noviter veniens in notitiam*) which alters the whole aspect of the case. *Phosphate Co. v. Molleson* (1879), 4 App. Cas., p. 814.

¹ (1884), 14 Q.B.D. 141.

² *Callandar v. Dittrich* (1842), 4 M. & G. 68.

³ Lapradelle and Niboyet, *Répertoire de Droit International*, Vol. VI, §§ 205 *et seq.* Lerebours-Pigeonnière, *op. cit.*, § 324. Sirey, 1927, I. 249; Clunet, 1924, p. 759 (a Belgian case). See the note of M. Audinet, Sirey, 1916, I. 113.

⁴ Lapradelle and Niboyet, *loc. cit.*

⁵ Clunet, 1924, p. 857. *Le Jugement étranger considéré comme un fait.*

⁶ e.g. it has been held that an English judgment to the effect that a debt is not due is an answer to an action for the recovery of the debt in a French court; Clunet, 1908, p. 155.

with certainty as a defence to a subsequent action in France, except possibly in certain matters affecting the status of persons domiciled abroad who are not French citizens,¹ unless it has been confirmed by *exequatur*. Belgian law differs from French law in so far as it attaches greater weight to a foreign judgment, and the Belgian courts will not, so it seems, entertain any proceedings on a cause of action which has already been adjudicated on by a competent foreign court.²

The rules of German law deal with the question of *res judicata* on a somewhat different principle. If the foreign judgment is one which would be enforced by the German courts, the successful party will not be allowed to sue again in Germany but must apply to the courts for an *exequatur*.³ If he has commenced an action abroad and it is still pending, the courts will not allow another action to be brought in Germany because the *Code of Civil Procedure* does not permit of duality of actions.⁴ But an enforceable foreign judgment is recognized by the German courts as a defence to further proceedings on the same cause of action whether an *exequatur* has been obtained or not.⁵

Conclusions.

(1) First of all as regards the Enforcement of Foreign Judgments: the position at the present time is that the rules of the different systems of Private International Law are not in harmony. Each country has its own views of the matter, which often amount, in practice, to a refusal to grant any recognition whatsoever to foreign judgments. It is common ground that no judgment of a court of one country should be executed *proprio vigore* in another country, but the conditions on which recognition or enforcement of a foreign judgment may be permitted as a concession, either to the theory of the comity of nations or to some other theoretical view of the nature of Private International Law, are so varied in character that it would seem to be impossible to weave them into a coherent fabric. The only possible solutions would seem to be either the general and complete abandonment of all national rules

¹ It is the practice of the French courts to recognize the foreign decree in such cases, without a previous *exequatur*, where no element of coercion of either of the parties is involved. This view of the matter is challenged by the doctrinal writers. Niboyet, *Précis de Droit International Privé*, §§ 460 and 461. Lerebours-Pigeonnière, *loc. cit.*, D.P. 1898, 2. 251.

² See Pouillet, *Manuel de droit international privé Belge*, § 498.

³ Krauss, *op. cit.*, at p. 71; Kahn, *op. cit.*, at p. 218.

⁴ Z.P.O., Art. 263.

⁵ Stein-Jonas, *op. cit.*, Vol. I, pp. 963, 964.

on the matter, and the construction of an entirely new system to be applicable throughout the civilized world, or else a more gradual process by which individual countries will enter into separate treaties with one another specifying the conditions on which mutual recognition and enforcement is to take place. There would appear to be serious objections to the first method. It is hardly conceivable, in the present circumstances, that a world-wide scheme—for such it would be in effect—could attain any real measure of success. The unqualified enforcement of a foreign judgment connotes a surrender by the state of one of its prerogatives, and is a matter which encroaches on its international independence and may easily wound its susceptibilities. It is a privilege granted to the foreigner, and one which must be guarded with care. It is always invidious to distinguish between countries for this purpose, but common sense calls for the admission that there are certain countries with an imperfectly developed judicial system whose tribunals do not command that degree of respect which would entitle their judgments to be vested with extra-territorial effect. There are other countries which possess the necessary equipment, but whose judiciary is not of such a character that its impartiality is beyond suspicion, particularly where foreign litigants are concerned. In other words unification cannot be regarded as feasible at present and each country must be allowed the right to select those other countries on which it proposes to confer the privilege of reciprocal enforcement of judgments. There are certain questions, no doubt, which will have to be handled with care, e.g. the question of the enforcement of damages awarded in delictual actions and the problems arising out of the conversion into national currency of judgments given for a sum expressed to be in foreign money, but these and similar difficulties should not prove to be insoluble if they are approached in a conciliatory spirit.

(2) The second question, which arises quite independently, is whether a valid foreign judgment should be regarded as a complete defence to a second action on the same grounds brought in the courts of another country. The technicalities which surround this matter are somewhat formidable and bewildering, but it would seem to be possible to ignore them, and to formulate a rule which would act as a bar to the unnecessary multiplication of legal proceedings. If this rule is based on some broad principle such as that which is embodied in the maxim *nemo debet bis vexari*, all the difficulties arising from the introduction into the question of

such doctrines, as those of estoppel and *res judicata* and of statements as to "conclusive" effect and the like, would be avoided. It should not be impossible to frame a rule in such a way as to provide that no person shall be entitled to sue or be liable to be sued more than once in respect of the same cause of action and to carry the rule no farther. The controversial point as to whether a judgment is to be regarded as estopping the person against whom it was given in respect of all questions of law or fact underlying the judgment is one which raises so many difficult problems that the wise course would seem to be to leave them to be determined, when they arise, by the national courts, and not to endeavour to solve them by clauses in a Convention which, in the existing state of the law in all countries, would be certain to create serious and unnecessary difficulties of interpretation.

Any attempt to secure reciprocity of recognition and enforcement will necessarily call for some sacrifices on the part of the countries involved. So far as England is concerned, this may mean the abandonment of the present archaic, cumbersome, and sometimes costly system of procedure by way of action on a foreign judgment *in personam* and the substitution for it of some system of registration such as that contained in the Administration of Justice Act, 1920. There appears to be no reason why this should not be done, and it would in any event not be a heavy price to pay for relief from the present position of deadlock which is apt at all times to cause inconvenience, and to result very often in serious hardship.

THE AUSTRO-GERMAN CUSTOMS UNION CASE

By ALEXANDER P. FACHIRI

WHEN the question of the legality of the proposed customs union between Germany and Austria was referred to the Permanent Court of International Justice for advisory opinion in May of last year, it appeared to be perhaps the most important case ever brought before the Court. Subsequent events have deprived the Opinion rendered of practical effect, but the case still merits special attention for several reasons. In the first place, the question was in itself of great interest from the legal point of view, and the opinions expressed by the Bench can therefore still be studied with profit. Secondly, the case, notwithstanding its inconclusive result, does constitute an outstanding event in the history of the Court; moreover, it has been widely misunderstood, and this makes it the more important to endeavour to form a true impression of the matter as a whole.

The origin of the case is well known; it was unexpectedly announced in March 1931 that Germany and Austria had concluded a preliminary agreement for a customs union. This caused such disturbance in international relations that it is no exaggeration to speak of a European crisis. The matter was immediately taken up diplomatically and raised at Geneva as a political question of serious dimensions, but in the course of the discussions one issue, which appeared to be of a legal character, emerged, namely, was the proposed customs union compatible with Austria's international engagements? It is plain that the fundamental objection to the customs union was not legal, but political and economic; moreover, no one ever suggested that Germany was precluded by any treaty from entering into the proposed relationship with Austria. The legal objection raised was, therefore, somewhat artificial. Mr. Henderson, as President of the Council, proposed that the legal question should be referred to the Court, and this was unanimously agreed to—by Germany and Austria, as a means of dealing with the only objection of which they admitted the possibility, and by France and the other Powers, as a method which might conveniently dispose of the whole matter on what to them was merely a preliminary point. The Council accordingly asked the Court whether the proposed customs régime would be compatible with Article 88 of the Treaty of Saint-Germain and with No. 1 of

the Geneva Protocols of October 4, 1922, providing for financial and economic assistance to Austria.

The text of these provisions is quoted in the report of the case that appears in another part of the present volume,¹ but it may be well to repeat the crucial words here. Under the Treaty, Austria undertook to "abstain from any act which might directly or indirectly compromise her independence", and under the Protocol, she undertook "in accordance with the terms of Article 88" "to abstain from any economic or financial engagement calculated directly or indirectly to compromise this independence", this being further defined in a proviso as including the obligation not to "violate her economic independence by granting to any State a special régime or exclusive advantages calculated to threaten this independence".

The case was elaborately argued by Counsel for the German, Austrian, French, Italian, and Czechoslovak Governments. Great Britain was not represented. When the Opinion came to be delivered it appeared that the Bench was greatly divided—eight judges being for the negative and seven for the affirmative, the majority, moreover, being itself split as regards the reasons for the decision. This is a matter for profound regret—as it is every time that there is a substantial division of opinion in the Court—but it is not unnatural, nor is it, as has been suggested, any proof of partiality. The fact is that, contrary to the view apparently held in some quarters, the question submitted to the Court was extremely difficult from the purely legal point of view, and one upon which different minds, no matter how judicial, could hardly be expected to reach the same conclusion.

The issue did not turn upon details of the provisions of the Austro-German Protocol of March 19, 1931. This contemplated the conclusion in the near future of a treaty to "assimilate the tariff and economic policies of their respective countries" within the limits of the principles laid down, and follows the lines one would naturally expect for the fulfilment of the purpose in view. There is no surrender of legal independence by one party to the other—uniform tariff and customs laws are to be simultaneously adopted in both countries; negotiations for commercial treaties are to be conducted jointly, but the treaties themselves are to be separately concluded; disputes are to be submitted to arbitration by an arbitral committee consisting of an equal number of members from each party, but the treaty may be denounced on either

¹ See p. 145 *infra*.

side if the decision is thought to infringe vital economic interests. All this conforms to a well-known type of customs union.

The preliminary agreement also provides that negotiations are to be entered into for a similar engagement with any other country expressing a desire to that effect, but, as the Opinion of the Court points out, this contingency did not affect the immediate result of the customs union as projected at the time.

Let us now consider the attitude adopted by the Court. The text of the Opinion itself is the result of a compromise. In the first place, it appears on the face of it that of the majority, Judges Guerrero, Rostworowski, Fromageot, Altamira, Urrutia, and Negulesco, and also, though for separate reasons, Judge Anzilotti, considered that the proposed régime was contrary to the Treaty of Saint-Germain as well as the Geneva Protocol of 1922, whereas Judge de Bustamante held that it only conflicted with the latter instrument. That is why the conclusion of the Court is merely that "a régime established between Germany and Austria on the basis and within the limits of the principles laid down by the Protocol of March 19, 1931, would not be compatible with Protocol No. 1 signed at Geneva on October 4, 1922".

This brings out the first issue of law: was the undertaking of Austria in the Geneva Protocol a mere repetition of that in Article 88 of the Treaty or was it of wider extent? The Opinion is so guarded on this point as to suggest that even Judges Guerrero, Rostworowski, Fromageot, Altamira, Urrutia, and Negulesco, or some of them, may have inclined to the first alternative. Judge Anzilotti, in his separate opinion, is quite definite on the subject, and so are the dissenting judges—Adatci, Kellogg, Rolin-Jaequemyns, Hurst, Schücking, van Eysinga, and Wang. They all hold that the Protocol merely states in slightly different words what was already stipulated in the Treaty.

This, it is respectfully submitted, is the correct conclusion. The first paragraph of the Protocol¹ is clearly nothing more than a repetition of the undertaking given in Article 88; and the second is in the nature of an explanation for the benefit of Austria. The use of the words "economic independence", upon which the Opinion of the Court lays stress, is explained by the subject-matter and merely means independence in the economic sphere.

If this is the right view, the reasoning by which the Court arrives at its conclusion is unsatisfactory. The Opinion frankly recognizes that the establishment of the customs union does not

¹ See p. 145 *infra*.

in itself constitute an act alienating Austria's independence, and goes on "it may even be maintained, if regard be had to the terms of Article 88 of the Treaty of Peace, that since Austria's independence is not strictly speaking endangered, within the meaning of that article, there would not be, from the point of view of law, any inconsistency with that article". This sentence is obviously inserted to meet the views of Judge de Bustamante alone, and its cautious terms will be noticed. The decisive reason in the Opinion is that if the projected régime "be considered as a whole from the economic standpoint adopted by the Geneva Protocol, it is difficult to maintain that this régime is not calculated to threaten the economic independence of Austria and that it is, consequently, in accord with the undertakings specifically given by Austria in that Protocol with regard to her economic independence". The necessity for basing the decision upon the Protocol cramps the style of the Opinion as a whole. It is essential to remember in reading the Opinion that seven of the eight judges thought that the customs union would be contrary to the Treaty, but could not say so in the body of the Opinion, and were forced to the artificial expedient of basing their conclusion upon the less important of the two relevant international instruments and defending it by reasoning which their colleague who differed could accept. This Opinion is unique among the decisions of the Court in that it is the actual conclusion alone which represents the view of a majority, and even so only a part of their view.

It may be said that this is far from satisfactory, and so it is, but it results from the division among the members of the Court. Once that unfortunate fact existed, the result arrived at was inevitable. With eight judges in favour of saying "No" to the question submitted to the Court, and seven in favour of "Yes", there was no alternative but to draw up an Opinion expressing the minimum which the majority could agree to. It may, however, be respectfully suggested that it might have been better to confine the Opinion of the Court to the bare conclusion and leave the individual members of the majority to give separate statements of their reasons, if they so desired. It is true that it has been the invariable practice for advisory opinions to contain a full statement of reasons, and this is, as a general rule, obviously desirable, but there is no provision obliging the Court to do so (as there is in the case of judgments), and in certain exceptional circumstances it might be preferable to adopt the other course. As it was, only seven judges concurred in the reasons—a minority of

the whole Court—and that being so, there does not seem to be much gained by including reasons in the Opinion.

At the beginning of these remarks, I ventured to say that this case raised difficult and doubtful questions of law. So far, only one has been mentioned—a question of construction—which, though arguable, was not perhaps of exceptional difficulty. But the crucial point for decision is of a different order. As stated by eight and recognized in substance by fourteen out of the fifteen judges, the fundamental issue was this: was the projected customs régime susceptible of endangering, or calculated to threaten, the independence of Austria? It is submitted that this was indeed a question bristling with difficulties. The Opinion of the Court does not, for the reasons indicated, really come to grips with this question, but it states the problem when it observes that the undertaking given by Austria in Article 88 of the Treaty to abstain from any act which might compromise her independence means abstention from any act calculated (*susceptible*) to endanger that independence in so far as can reasonably be foreseen—in other words, it is not a question of recognizing the existence of an accomplished fact, but of weighing probable consequences. Judges Guerrero, Rostworowski, Fromageot, Altamira, Urrutia, and Negulesco state in a note that, in their opinion, the proposed customs union, since it would be calculated to threaten the independence of Austria in the economic sphere, would constitute an act susceptible of endangering the independence of Austria and would accordingly be incompatible with Article 88, but they give no further reasons or explanation.

In the joint dissenting opinion the opposite conclusion is reached. The dissenting judges state at the outset that they agree generally with the rest of the Court as to the nature and extent of the obligation accepted by Austria and also with the description of the proposed customs régime given in the Opinion of the Court. What they do not find there is any explanation as to how and why that régime would threaten or imperil Austria's independence. The dissenting opinion then goes on: "The Council has asked for the opinion of the Court on a legal question. This question is in effect whether the proposals embodied in the Vienna Protocol are, or are not, compatible with the obligations assumed by Austria in the two other international instruments referred to in the question. That question is purely legal in the sense that it is concerned with the interpretation of treaties."

This is really the crux of the matter. It is to be noted that the

majority, no less than the minority, fully and expressly recognized that the Court's function was to deal with the matter from the point of view of law, but the judges of the minority treat the question in issue as being itself a question of interpretation of treaties and therefore a pure question of law. Proceeding upon this basis, the dissenting opinion refers to the principle that restrictions on its liberty of action which a state may agree to do not affect its independence provided they do not deprive the state of its organic powers, and no such deprivation is, of course, contemplated on the face of the Vienna Protocol. It follows that the establishment of the proposed customs régime cannot in itself be "calculated to threaten" Austria's independence. It is only the consequences resulting from the establishment of the régime which would make it incompatible with Austria's obligations, Austria's responsibility being limited to such consequences as can be reasonably foreseen at the moment of the act. In the opinion of the dissenting judges the only grounds upon which an inference adverse to Austria could be based would be (1) something in the actual provisions of the Vienna Protocol, or (2) evidence that other customs unions had endangered the existence of the states concerned. No such evidence had been adduced, and the Court could not assume that the establishment of a customs union on a basis of complete equality between two states is calculated to endanger the future existence of one of them.

This conclusion is really the result of the above-mentioned interpretation of the question submitted to the Court. What the dissenting judges say in effect is this: We have to consider only, on the one hand, the text of the Vienna Protocol, and, on the other, the text of the Austrian undertakings; from the latter we see that Austria's obligation is not to do anything calculated to threaten her independence; there is nothing in the terms of the Vienna Protocol to show that the proposed régime is so calculated; and the historical precedents do not establish that the probable consequence of a customs régime is in itself to endanger the independence of its members. Therefore the question must be answered in favour of Austria.

Whilst recognizing that this is, in many respects, a cogent and attractive way of envisaging the matter, I respectfully submit that it is too narrow and leaves the real issue undecided. It is for this reason that personally I prefer the argument developed by Judge Anzilotti.

That learned judge, in his separate opinion, says that the

question whether the customs union contemplated by the Vienna Protocol must be considered as an act susceptible of endangering Austria's independence is a question of fact. "The question amounts to asking whether, in view, on the one hand, of the respective positions of Austria and Germany, and in view, on the other hand, of the consequences which the Customs Union would have on Austria's economic life, it can reasonably be foreseen that a dangerous situation would ensue for the independence of Austria." The learned judge adds that the Court is concerned with a particular instance, and one which derives all its importance from the fact that we are dealing with the relations between Germany and Austria. "It is quite probable that a similar customs union between Austria and Czechoslovakia would not have raised the slightest difficulty. It is not Austria's right to enter into customs unions in general with which we are concerned, . . . but with *this* Customs Union and *this* Customs Union alone."

This passage has been criticized, but it seems to me to contain the root of the matter and to bring out the issue intended to be raised by the question submitted to the Court; and, as the judge points out, the answer necessarily depends upon political and economic considerations. By excluding such considerations the dissenting judges, it is respectfully submitted, excluded the most relevant material.

Judge Anzilotti, on consideration of the historical, political, and economic facts which are common knowledge, comes to the conclusion that the Austro-German customs union must be considered a fact which might compromise Austria's independence within the meaning of Article 88 of the Treaty of Saint-Germain. It is impossible to dogmatize about a question of this nature, depending as it does upon an estimate of the probable future consequences of existing facts, but the conclusion reached appears to me to be on the whole reasonable.

On the merits, therefore, it is Judge Anzilotti's opinion which is, to my mind, the most convincing, but there remains the question, which he himself fully discusses, whether the Court should not have declined altogether to give an advisory opinion involving considerations of this nature. Here I venture to disagree with the learned judge and submit that by far the best course would have been to refuse to give the opinion asked for, as was done in the *Eastern Carelia* case. On principle it is undesirable that the Court should embark upon inferences or estimates as to the effect of political and economic relationships, and if a question submitted

for advisory opinion necessitates this—as I think the present question did—the Court should decline to deal with it. As it happened, this course would not even have caused any practical inconvenience, seeing that the proposed customs union was abandoned by the parties before the Opinion was delivered.

The impression left upon my mind by an examination of this case is that both the Opinion of the Court and the joint dissenting opinion evade the real question—the former by not explaining the reasons for the conclusion reached, and the latter by adopting a legal test which in effect leaves the real point untouched—and that Judge Anzilotti gives the true answer, which, however, it would have been better not to give at all! But whatever view is taken, it is hoped that enough has been said to make good the assertion that this was a case of exceptional difficulty, upon which differences of opinion are in no way surprising.

In conclusion, may I add one general observation? This is the second occasion upon which dissenting judges of the Court have taken the course of delivering a joint opinion,¹ and in my respectful submission this is highly undesirable. Every one will agree that any wide measure of disagreement within the Court is, in itself, regrettable, but its unfortunate effect is magnified if an impression is created of the Bench being divided into two camps, one against the other, as tends to be done by two opinions representing an almost equal numerical strength. The Rules of Court² do not indeed appear to contemplate this procedure, but, quite apart from any technical objection, it seems to be objectionable in principle. The judgment or opinion of the Court should represent the combined labours of the whole Bench working in collaboration, and any irreconcilable dissent should be that of the individual judge concerned—as it were an addendum expressing his personal views. This is the spirit in which the Court has worked in the past and continues to work at the present time, but in order that this may be apparent to all, it is earnestly to be hoped that a practice of joint dissenting opinions will not be allowed to grow up.

¹ The other instance is the second *Free Zones of Upper Savoy Order*, Series A, No. 24. Judges Anzilotti and Huber also joined in a dissenting opinion in the *Wimbledon* case, Series A, No. 1, but the other dissenting judge gave a separate opinion.

² See Articles 62 and 71.

BRITISH AND AMERICAN POLICY AND THE RIGHT OF FLUVIAL NAVIGATION

By RUTH E. BACON, Ph.D.

THE law now generally accepted as governing international rivers has owed its substantive development in large measure to two factors: the theories advanced by certain authoritative writers, and the expedients worked out by states in the actual handling of problems. Separated at first by a tremendous distance, these two factors have tended gradually to converge. States have come to appreciate in practice the value of support by a recognized theory, while publicists have shown an increasing regard for facts when formulating opinions. Of these two factors, the second in a sense has been predominant. Theories have usually worked their way into law only after a period of apprenticeship in the service of some state.

In their formative effects upon this legal development the policies adopted by Great Britain and the United States have been most notable. While possessing territory upon but few international rivers, these two countries have influenced the regulation of international rivers throughout the world, and thus contributed out of measure to the creation of International Law upon the subject. In the case of each of the two countries it is not merely the nature and consistency of the policy followed but also the theoretical foundation upon which it has been rested that is of importance. In a previous article I traced the policy of Great Britain towards the rivers of the Continent, especially the Danube and Scheldt.¹ In the present article it is proposed to extend the study so as to compare British policy with American, and to include non-European as well as European rivers.

I

Underlying Theories: Conventional Right versus Natural Right.

Underlying the policies followed by the two states there appears a distinct cleavage of opinion upon a central issue, the nature of the right of fluvial navigation. Even when both governments were agreed in objective, the theory which Great Britain in general

¹ "British Policy and the Regulation of European Rivers of International Concern", *B.Y.I.L.*, 1929, pp. 158-70.

has asserted in support of her action has differed from that of the United States. This divergence was the natural reflection of differences in traditional policy, geographical situation, economic position, and general outlook.

The British theory may be briefly stated, for its fundamental principles were early adopted and have undergone but slight modification. Great Britain has usually held that freedom of navigation on an international river for riparians and non-riparians alike was purely a conventional right. It had no existence apart from treaty agreement. It was never to be assumed, but must be expressly conferred through a treaty stating general principles, or by a special grant relating to a designated river. Since the rights of the sovereign were absolute over that section of the river within his jurisdiction, he was under no obligation to allow passage to the nationals of any other country, unless adequate compensation were offered. If the privilege were granted, the sovereign retained full power to introduce any regulations he might choose, except in so far as expressly restrained by the terms of the grant.¹

The United States, on the other hand, has regarded freedom of navigation, under certain circumstances, as a right which might be claimed apart from treaty stipulation. The basis for this right was found in natural law, and in consequence was the subject of vague generalization on many occasions. Natural law does not lend itself easily to precise definition. If attention is centred, however, upon the statements of those responsible for the conduct of American policy, it will be seen that, beneath the sometimes expansive phrases, the right asserted was not all-inclusive, but was circumscribed for the most part carefully and consistently. Unlike the British theory, the American doctrine has undergone a gradual process of development.

The theory of the natural right of navigation was presented briefly by the Continental Congress with reference to the Mississippi before American independence had yet been assured. This first statement amounted to a mere assertion that the general good of mankind demanded that an upper riparian, when possessed of a large section of one bank of a river which formed the only outlet to the sea, should be allowed the use of the river to reach the ocean.² Jefferson accepted essentially the same principle. He did

¹ Briefly stated or tacitly assumed on numerous occasions, the most complete treatment of the British position is contained in the reply of the British commissioners to the American in the course of the discussions of 1824 with regard to the Saint Lawrence: 5 *Amer. State Papers, Foreign Relations*, 574-9; 19 *Br. and For. State Papers*, 1075-88.

² 2 *Secret Journals of the Continental Congress*, 335.

not claim that all nations had a natural right to navigate all rivers; only that co-riparians should enjoy their river in common. The basis of this right he found "written in the heart of man". The closing of a river by a lower riparian against an upper state could only be regarded as "an act of force by a stronger society against a weaker, condemned by the judgment of mankind".¹

When the regulation of the Saint Lawrence came under discussion in the next century, John Quincy Adams, Richard Rush, and Henry Clay, while turning to the principles of natural law for support, were careful to limit their statements to the right of upper riparians to reach the sea. Rush sought the basis of this right in "the relations between the soil and the water, and those of man to both".² According to Henry Clay,

"The incontestible right which one nation has to trade with others, by their consent, carries along with it that of using those navigable means necessary to its enjoyment, which the bounty of nature has provided for all, in respect to the sea, and, in regard to rivers, for the nations who inhabit them."³

Clay's doctrine was specifically reaffirmed by Grant in his message in 1870.⁴

It was this principle of Henry Clay's—the right of one nation to trade with another by its consent—that made possible the development of the theory to support the claim of the United States to the use of the main river systems of South America against the opposition of Brazil. The manifest desire of the upper riparian states to trade with the outside world, expressed by decrees and by treaties, formed the basis of the American claim as presented by J. Randolph Clay, representative in Peru. Peru, Bolivia, and the other upper riparians, so he argued, possessed the right to trade with whatever nations they chose by means of their common river. They had indicated by treaty their desire to trade with the United States. The United States therefore enjoyed the right to trade with the upper republics, and the Amazon was the natural means provided for this purpose. He explained that

"... each nation is obliged to use its rights in such a way that they may not prejudice those which others have by natural law. Thus it is that, the Republic

¹ "Observations on the subjects of negotiation between the United States of America and the Court of Spain", *The Writings of Thomas Jefferson* (Federal Edition), VI, 425.

² "American Paper on the Navigation of the Saint Lawrence", 5 *Amer. St. P., For. Rel.*, 572. Adams's views, upon which Rush's memorandum was in large measure based, are contained in his instructions to Rush of June 23, 1823, 9 *Instructions, MSS., State Department*; extracts in 7 *Amer. St. P., For. Rel.*, 757-8.

³ Clay to Gallatin, June 19, 1826: 6 *Amer. St. P., For. Rel.*, 762-7.

⁴ *U.S. For. Rel.*, 1870, 11-13.

of Bolivia desiring to enter into commercial relations with the United States, the Empire of Brazil has no right to prevent the free navigation of the Amazon River."¹

In stressing the right of American vessels to navigate the Amazon, then, J. Randolph Clay was asserting not the natural right of non-riparians to the use of all international rivers, but the right of co-riparians to the full enjoyment of their common river. The right of the United States was a corollary of the natural right of Bolivia and the others to the free use of the Amazon for purposes of trade. Many of Marcy's statements are much broader, and, taken apart from their context, appear to assert a natural right to the use of all international rivers. Yet in the background is a recognition of the need of established commercial relations with the upper riparians as a preliminary to any claim of natural right. He demanded from Brazil the renunciation of any authority claimed to prevent the passage of American vessels along the river "in their legitimate commerce" with the upper states, and speaks of "the right which we claim to carry our products upon the Amazon to a third country".²

It is evident, therefore, that although the fact is recognized that the American theory may not on every occasion have been consistently or precisely developed, a definite underlying body of doctrine can be traced. Stated in its simplest terms it amounted merely to an assertion that a people should be allowed to use the natural means at its disposal to carry on trade and intercourse with other nations by their consent, if this could be done without injury to the nation through whose jurisdiction passage must be made.³ Transit by water only is comprehended: for transit by land can never be entirely "innocent". No right of navigation may be claimed by outside Powers on a national river without the owner's consent, since no nation is forced to carry on trade with any other unless it wishes to do so. If it prefers to keep its rivers closed, no complaint can be made. If, however, an

¹ Clay to the Minister of Foreign Affairs of Bolivia, July 2, 1852. Clay's views are set forth at length in his dispatches to the Secretary of State, especially No. 135, to Edward Everett, March 25, 1853, and No. 152, to Marcy, July 21, 1853, 9 *Peru, Dispatches, MSS., State Dept.* Dana, American representative in Bolivia, shared the same opinion. He wrote to Marcy, January 28, 1854, that "in the absence of fixed, recognized, commercial relations with some of the powers possessing the upper waters of the Amazon, we can have no pretence of right, as against Brazil, to enter it, and no hope that she will concede it". No. 3, 1 *Bolivia, Dispatches, MSS., State Dept.*

² Marcy to Trousdale, August 8, 1853, No. 3, 15 *Brazil, Instructions, MSS., State Dept.*

³ Clay to Gallatin, June 19, 1826, *op. cit.* See also 6 *Amer. St. P., For. Rel.*, 762.

international river forms the only convenient means of access to the ocean for an upper riparian, and that state desires to carry on trade with outside nations, the lower riparian should not interfere with the passage of vessels of the upper state on their way to the sea, nor of vessels of the outside nation on their way to the upper state. The element of trade by consent is important. Only in case the upper state desires to carry on trade with other nations can outside Powers claim the use of an international river.

The basis of this right is variously described. Henry Clay found it in "the incontestible right which one nation has to trade with others, by their consent". This answer merely moves the original question one step farther back. In what source does this incontestable right to trade originate? Jefferson, Adams, Rush, Randolph Clay, and others, reply in different terms: the heart of man, the clear indications of Nature and Providence, the general good of mankind, rights inherent in the "natural man", and similar expressions. Despite the diversity of language, the meaning is clear. The American doctrine of the natural right of navigation was grounded in a sense of the injustice of arbitrary and selfish restriction. Merely because a nation happened to be located at the mouth of a river was no reason why it should prohibit the enjoyment of the river to its less fortunate neighbour, when such use would cause no injury or expense to itself and result in great benefit to the upper riparian. The American theory of the natural right of navigation was the assertion of a moral claim, not a legal right.

Two main criticisms were directed against the American position. The first related to the theory of sovereignty. How reconcile this natural right of navigation with sovereign rights? If a sovereign is absolute within his territory, how can any circumstances, no matter how extenuating, create a right which can avail against this paramount right? Adams, as Secretary of State, answered this objection by pointing out that

"... the exclusive right of jurisdiction over a river originates in the social compact and is a right of sovereignty. The right of navigating the river is a right of nature preceding it in point of time, and which the sovereign right of one nation cannot annihilate as belonging to the people of another."¹

Moreover, the only effect of the natural right was to prevent the

¹ Adams to Rush, June 23, 1823, *op. cit.* Objection on the ground of sovereignty had been raised by the British Government, 19 *Br. and For. St. P.*, 1087, and by the Brazilian Government, Trousdale to Marcy, September 15, 1854, No. 19, 21 *Brazil, Dispatches, MSS., State Dept.*

sovereign under certain circumstances from prohibiting passage. The sovereign right of regulating navigation remained unimpaired, provided it was not exercised in an arbitrary manner.¹

The second main criticism of the American doctrine involved the relation of natural right to treaty right. Objection had been raised that the prevalence of treaties stipulating for freedom of navigation and regulating its exercise was evidence that the origin of the right was conventional, not natural. The United States explained that treaties regulated, without creating, the right of navigation. The law of nature was sufficiently intelligible in its great outlines and general purposes, but it left the details for agreement between nations. The example of the ocean was cited. Every one agreed that the ocean was common to all nations, yet treaties regulating navigation to prevent collisions were constantly being negotiated. The provisions of the Act of the Congress of Vienna merely recorded existing rights, without granting new ones.²

In theoretical basis, therefore, the customary policies of the United States and Great Britain differed widely. Great Britain recognized no claim of right on the part of one nation to navigate a river, national or international, within the jurisdiction of another nation, unless this right was sanctioned by express conventional agreement. The United States, on the other hand, held that an upper riparian could claim a right apart from treaty provision to the use of the river if it formed the only convenient means of intercourse with outside nations, if the outside nations desired to establish communication with the upper state, and if this could be done without injury or expense to the lower state. As a corollary of this right, the United States deduced a claim on the part of outside nations to the use of an international river to carry on trade and intercourse with an upper riparian by its consent. Other corollaries included the right to a convenient place of deposit, the maintenance of lights, buoys, and the like, and the provision of pilots.³ As has been indicated, however, the two governments were discussing rights of different natures. Great Britain was supporting a legal right; the United States, a moral one.

¹ Marcy to Trousdale, August 15, 1853, No. 3, *15 Brazil, Instructions, MSS., State Dept.* In case expense was incurred by the lower state, moderate tolls might be levied, *5 Amer. St. P., For. Rel.*, 571.

² Clay to Gallatin, June 19, 1826, *op. cit.*; also J. Randolph Clay to Everett, February 8, 1853, No. 129, *9 Peru, Dispatches, MSS., State Dept.*

³ *The Writings of Thomas Jefferson, op. cit.*, VI. 428.

II

Practical Application of Theories.

Though differing widely in basis, when actual application was concerned the theories of the two governments were not far removed. Both states enforced their right of navigation on the basis of treaty alone. Great Britain claimed that the right of navigation originated in the treaty; the United States, that the right was derived from natural law independently of any treaty, but that conventional agreement was required to arrange the details. Both agreed that consent must be asked of the sovereign through whose territory passage was to be made. Great Britain held that the sovereign's decision was unfettered and absolute; the United States, that the right might not be denied without plausible excuse. Both agreed that the sovereign might prescribe regulations to be observed by all vessels on the river. Great Britain claimed that unless restrictions on the freedom of the sovereign had been imposed by the treaty, the sovereign was at liberty to prescribe such regulations as he might choose. The United States asserted that the sovereign was never at liberty to impose arbitrary or unreasonable regulations.

Only one difference of great practical importance existed between the two governments on this question: that related to the degree of obligation resting upon the sovereign of whom a right of passage was asked. According to the British view, the sovereign was perfectly free to grant or to refuse. Since he was in no wise obliged to grant this privilege, if he chose to do so he was entitled to ask a consideration in return, which the recipient of the privilege must meet or else forgo the use of the river. In the opinion of the United States, however, when the stipulated conditions existed, the sovereign was obliged by a regard for the good of mankind to grant the right. No compensation could possibly be required for the recognition of this right, which was founded in natural law and antedated the social contract. As the question of moral obligation was the real point of division between the theories of the United States and Great Britain, so in practical application was the question of compensation.

III

Consistency in Application of Principles.

In applying their principles, the two governments have shown a large degree of consistency. Considering the policy of Great

Britain towards the rivers of Europe, it is found that even in the period prior to 1815, the British Government maintained that freedom of navigation was a purely conventional right. On the basis of treaty commitments she supported the States General in closing the Scheldt; and on the same basis she opposed the action of the French Convention in declaring the river open to the common use of its riparians. At the Congress of Vienna she obtained an international agreement asserting certain rights in ambiguous terms. She supported the more liberal of the two possible interpretations of these provisions, and secured the eventual acceptance of her view by treaty arrangements regulating the chief international rivers of Europe. She has endeavoured to obtain rights of navigation and control for herself as a non-riparian either on the basis of the general principles recognized by the great Powers in the Act of the Congress of Vienna, or as part of a peace settlement extracted from a defeated foe.¹

In North America, similar principles have been applied by Great Britain. British rights on the Mississippi were secured from France by the treaty which concluded the Seven Years War.² These rights were recognized by international agreements in 1783, 1794, and 1796.³ When the United States succeeded France and Spain in control of the river, Great Britain based her claim upon her treaty of 1783 with the United States. That treaty, drawn up in the belief that both countries possessed territory upon the river, provided for freedom of navigation from source to ocean for British and American vessels. The war of 1812 terminated the application of this clause, but already its practical value had been impaired by the discovery that the Mississippi rose within American territory.⁴ On the Saint Lawrence, as a lower riparian, Great Britain refused to open the river to the United States unless satisfactory compensation was paid.⁵ The river was opened on this

¹ "British Policy and the Regulation of European Rivers of International Concern", *loc. cit.*

² Art. 7, Definitive Treaty of Peace, 1763, 15 *Hansard*, 1295. For the negotiations, see *Correspondence of John, 4th Duke of Bedford* (John Russell, editor), Vol. III.

³ Art. 8, treaty of 1783 between Great Britain and the United States of America, 8 *U.S. Stat. at L.*, 83. The treaty between Great Britain and Spain contained no mention of the Mississippi. Art. 3, treaty of 1794, *ibid.*, 117-18; Explanatory Act of 1796, *ibid.*, 130-1.

⁴ Negotiations, 1803-7: *Amer. St. P., For. Rel.*, II. 584-91; III. 162-5, 185; 1814: *ibid.*, 709-11, 615-749; also *Correspondence, Dispatches, and other Papers of Viscount Castlereagh, 2nd Marquess of Londonderry* (C. W. Vane, editor), Vol. X; *Amer. St. P., Misc.*, II. 938-56; 1818: *Amer. St. P., For. Rel.*, IV. 348-407.

⁵ Negotiations of 1815-17: *Amer. St. P., 1815-18*, II. 13-54; *Amer. St. P., For. Rel.*, IV. 367-8; of 1818, *ibid.*, 383; of 1823-7, *ibid.*, V. 539-43, 566, 571-91; VI. 757-77.

basis in 1854.¹ In the negotiations preceding the treaty of 1871 she assumed the same position, and the resulting treaty was so framed as to be capable of interpretation to suit the British point of view.² In like manner she secured by treaty, rights on the Columbia,³ the Yukon, and other rivers of the west coast.⁴

In South America, as a non-riparian, she supported her claim to the use of the Amazon and the Plata by reference to treaties of commerce and navigation, or to most-favoured-nation treaties negotiated with the riparian states.⁵ Only when these states admitted the vessels of other nations into their waters did she demand like privileges.

With the rivers of Africa, the case was different. It is true that the British Government attempted to purchase rights of navigation on the Congo from Portugal by the unratified treaty of 1884.⁶ It is equally true that, following the failure of this attempt, she helped to secure the opening of this river by international agreement. Nevertheless, in the course of these negotiations statements were made by British representatives on more than one occasion which it is difficult to reconcile with a strict adherence to traditional British theory.⁷ When the Zambesi was under discussion all pretence was thrown aside. Great Britain refused to purchase the right of navigation on the terms named by Portugal, and in

¹ Art. 4, treaty of 1854, *10 U.S. Stat. at L.*, 1091-2. For negotiations, see Notes to and from the British Legation, *MSS.*, *State Dept.*; *House Doc. No. 64, 31st Cong., 1st Sess.*; *Senate Ex. Doc. 1, 32nd Cong., 1st Sess.*; *House Doc. 1, 32nd Cong., 2nd Sess.* For the Canadian attitude see C. C. Tansill, *The Canadian Reciprocity Treaty of 1854*.

² Art. 26, treaty of 1871, *17 U.S. Stat. at L.*, 872; negotiations: *Treaty of Washington, Papers, 1871, MSS.*, *State Dept.*

³ Art. 2, treaty of 1846, *9 U.S. Stat. at L.*, 869.

⁴ Art. 26, treaty of 1871, *op. cit.*

⁵ On the basis of Art. 2 of the treaty of friendship, commerce, and navigation between Great Britain and Peru (1850), Great Britain claimed any privileges on the Amazon which Peru might grant to the United States, or Brazil, or any other nation: Mr. Sullivan, British Chargé d'Affaires, to Mr. Tirado, Lima, October 25, 1853, enclosed in dispatch no. 175, Clay to Marcy, November 24, 1853, *10 Peru, Dispatches, MSS.*, *State Dept.* For the Plata system, see especially Arts. 1 and 4, Convention between Great Britain and the Argentine Confederation, 1849, *Br. Parl. Papers, 1850*, Vol. LVI, p. 4; treaty between Great Britain and the Argentine Confederation for the free navigation of the rivers Parana and Uruguay, 1853, *42 Br. and For. St. P.*, 3-6; treaty of friendship, commerce, and navigation between Great Britain and the Republic of Paraguay, 1853, *ibid.*, 20.

⁶ Art. 4, treaty of 1884, *75 Br. and For. St. P.*, 478. Negotiations: Africa No. 2 (1884), *Br. Parl. P.*, 1884, Vol. LVI.

⁷ For the protocols and general act of the West African conferences, see Africa No. 4 (1885), *Br. Parl. P.*, 1885, Vol. LV. For the British negotiations preceding it, see Africa No. 5 (1884), *ibid.*, 1884, Vol. LVI; Nos. 7 and 8 (1884) and No. 3 (1885), *ibid.*, 1884-5, Vol. LV; No. 2 (1885), *ibid.*, 1885, Vol. LV.

the absence of any treaty stipulation whatever asserted her right to the use of this "natural highway".¹

It is evident, therefore, that the principles which Great Britain applied to the rivers of other continents did not extend to the rivers of Africa. In explaining her position Great Britain insisted that conditions on the Congo and Zambesi required special treatment. Two facts are apparent, however. First, on the Zambesi, in regard to which the greatest departure from traditional policy was made, Great Britain appeared in a role unusual for her, that of an upper riparian. Second, by the time that the chief discussions with regard to the Congo and Zambesi occurred, the fundamental questions in dispute between the United States and Great Britain with regard to their common rivers had been settled. For the first time in sixty years, Great Britain was free to deviate from her traditional policy of opposition to natural law doctrines without exposing her position on the Saint Lawrence to immediate attack.

Turning to the policy of the United States, a large measure of consistency has characterized in general the application of the American natural law theory. With regard to the rivers of Europe and of Africa, there was no need to assert the doctrine in its full form. The United States was never forced to vindicate her right to the use of any of these rivers. Although American representatives took part from time to time in discussions with regard to such rivers, they did so usually only after freedom of navigation for riparians and non-riparians had been accepted in principle.²

In North America, however, the United States was directly and constantly concerned in urging her rights as a riparian. From the time of the first discussions with regard to the Mississippi between the United States and Spain until the final settlement of the question forty years later, the American Government presented the natural right theory on almost every occasion and with increasing emphasis. During certain critical periods when the existence of the nation was at stake, the United States considered

¹ Speech of Sir James Fergusson, Under-Secretary of State for Foreign Affairs, House of Commons, May 17, 1888: 326 *Hansard*, 599. Fergusson's statement received the especial approval of Lord Salisbury as an accurate expression of the views of the British Government: Salisbury to Petre, June 25, 1888, No. 49, Africa No. 2 (1890), *Br. Parl. P.*, 1890, Vol. LI. See also the British attitude towards navigation on the Zambesi and the Shire in 1877: Morier to the Portuguese Minister of Foreign Affairs, January 14, 1877, 69 *Br. and For. St. P.*, 1351.

² Examples of American participation previous to 1917 include the treaty for the redemption of the State Tolls (1861) and the Scheldt Tolls (1863). For negotiations see *MSS.*, *State Dept.*

a surrender of the exercise of the right, or the offer of compensation for its use, at the same time usually expressing a reluctance at the idea of abandoning the right itself.¹ She recognized and of necessity even supported the British right of navigation until it was established that Great Britain was not a riparian, and until the treaty grant of right had been cancelled by an intervening war.²

With regard to the Saint Lawrence, the United States asserted the same principles, time and again choosing to forgo the exercise of the right rather than purchase it as a concession.³ In 1854 she yielded to economic pressure, and, abandoning her previous stand, secured the navigation as a privilege, only to revoke the treaty a few years later.⁴ In the negotiations of 1870 and 1871 she reiterated her devotion to natural right principles, and declined to accept any treaty involving an abandonment of such right. The Treaty of 1871 settled the question by an article capable of interpretation from the American point of view. At the same time, the United States recognized the corresponding right of Great Britain as an upper riparian to navigate the international rivers of Alaska.⁵ In a few cases, the United States entered into treaty arrangements declaring freedom of navigation on a designated section of the river only. In the Treaty of 1848 between the United States and

¹ *Secret Journals of the Continental Congress*, II. 393-5; IV. 81-5, 123-7.

² The right was recognized by Art. 3, treaty of 1794, and the explanatory act of 1796, *op. cit.* When Spain complained that the latter conflicted with prior engagements of the United States under Art. 4 of the Spanish-American Treaty of 1795, and denied that Great Britain possessed any rights on the river, the United States defended the British right: 2 *Amer. St. P., For. Rel.*, 16-17. By 1802 both governments were convinced that the Mississippi rose within American territory. Great Britain therefore no longer possessed a natural right. Her treaty right was terminated by the war of 1812: Castlereagh Correspondence, *op. cit.*, X. 67.

³ Negotiations of 1823-7, *op. cit.* In the negotiations of 1815-18 no mention of natural right was made, the United States even referring to the navigation in one instance as a privilege: 2 *Amer. St. P.*, 1815-18, 30. This circumstance was explained, apparently, as was the omission of any mention of the Saint Lawrence in the treaty of 1783, by the fact that the American section of the river was practically unpeopled at the time. Thus no real need, the necessary basis for a natural right, could exist.

⁴ Art. 4, treaty between Great Britain and the United States of America relative to Fisheries, Commerce, and Navigation, 1854, 10 *U.S. Stat. at L.*, 1091-2. A joint resolution of January 18, 1865, provided for the termination of the treaty: Joint Resolution No. 6, 13 *U.S. Stat. at L.*, 566.

⁵ From the British point of view, the use of the rivers of Alaska could be regarded as compensation paid by the United States for the opening of the Saint Lawrence. From the American point of view both stipulations could be regarded as the recognition of the natural right of an upper riparian to the use of a river to reach the sea. The wording favours the British contention. For the negotiations which led to this conclusion, see *Treaty of Washington Papers, 1871, MSS., State Dept.*

Mexico, for example, it was agreed that the Rio Grande should be enjoyed in common from the American boundary to the sea. No corresponding right on the part of Mexican vessels to navigate on the American section was recognized.¹ Such a provision was in accord with the American theory of natural law which was concerned with the right of an upper riparian on an international river to use this means of communication to establish relations with other nations with their consent. Thus the United States as an upper riparian would possess a natural right to reach the sea. Mexico, however, could have no object in desiring to use the American section of the river, except to trade within American territory. If the United States chose not to allow that, no natural right of Mexico's would be infringed. The same principle holds for the provision for the Columbia River in 1846. Similarly, if interests other than navigation are more important to riparians than the navigation itself, the river may be diverted to other purposes.² The existence of a real need which could be satisfied without injury to others was the necessary basis for any assertion of natural right.

When as a non-riparian the United States sought to navigate the rivers of South America against the opposition of Brazil, she again found support in natural law. It was at American instigation that the upper riparians declared navigation within their boundaries free in whole or in part and arranged treaties of commerce so as to afford a basis for the American claim.³

Although basing her demands upon natural law, the United States has never exercised this right except in accord with the provisions of a treaty or decree. This insistence upon conventional agreements, though undoubtedly expedient for practical reasons, was consistent with the view that natural law, though unmistakable in its general outlines, left the details for subsequent regulation.

¹ Art. 7, treaty of 1848, 9 *U.S. Stat. at L.*, 928-9; Art. 4, treaty of 1853, 10 *U.S. Stat. at L.*, 1034.

² On the Rio Grande, for example, the interests of irrigation were recognized in the convention of 1906 which regulated the diversion of the water, 34 *U.S. Stat. at L.*, 2953. On other rivers, fishing, logging, or the generation of electric power may rival navigation.

³ The negotiations between the United States and the South American states can best be followed in the dispatches and instructions in the State Department archives. On the Plata system, difficulties with Paraguay relative to an American cigar factory on the river, and to an attack on the U.S.S. *Water Witch*, led to the dispatch of a naval expedition in 1857, but this was for the protection of American property rather than for the enforcement of a right of navigation. See *Record of Confidential Letters*, Navy Dept., and MSS. in the State Dept.

A review of the policies of Great Britain and the United States towards international rivers, therefore, does show certain inconsistencies and modifications in the application of principles. British policy with regard to the rivers of Africa, and the American acceptance of the Treaty of 1854 for the Saint Lawrence, are examples. Despite this fact the general trend of the policies is evident. The large degree of consistency shown is not surprising when it is considered how admirably the theories suited the respective needs of the two governments. The United States was primarily concerned either as an upper riparian, or as a non-riparian. Throughout the greater part of the discussions she was a young and weak Power, unable to enforce her right of way, and with insufficient bargaining powers to purchase it at reasonable rates. Natural law offered the only basis upon which she could assert her rights. Moreover, natural law principles were in accord with the general outlook of the American people upon international questions. Great Britain was differently situated. On only one important occasion was she placed as an upper riparian, and then she deserted her principles. As a non-riparian she found the purchase of treaties a comparatively easy matter. She secured rights repeatedly at the conclusion of successful wars as part of the price of peace extracted from a defeated enemy. When she chose to conclude treaties of navigation and commerce, or most-favoured-nation treaties, her established position as a political and commercial Power, and her territorial possessions in all parts of the world, enabled her to bargain in a manner which the United States could not emulate. Moreover, since the two nations were constantly engaged in discussions with each other, it was impossible for either, after assuming a decided position, to change principles in any part of the world without adversely affecting her cause in North America. For all these reasons, the United States early adopted and almost invariably applied natural law theories, while Great Britain adhered with nearly equal devotion to the conventional right theory.

IV

Special Objectives of British and of American Policy.

In carrying out their policies, the two states have at times concurred and at times disagreed as to method and objective. Both countries have favoured the abolition of all tolls impeding navigation. As the leading commercial nation involved, Great

Britain assumed the heaviest burden in the redemption of the Elbe and Scheldt tolls and thus made possible the liberation of these rivers from such impositions.¹ On other occasions she has secured the acceptance of the principle that no tolls should be levied on the mere act of navigation, but solely to meet expenses unavoidably incurred for upkeep, lights, buoys, and the like. The United States has worked with Great Britain in this endeavour, taking a share in the redemption of the Elbe and Scheldt tolls despite the distraction and expense of an exhausting civil war.²

As a means of regulating international rivers, Great Britain has used her influence to promote the establishment of international commissions with large powers of regulation over the details of navigation, and guided by elaborate conventions setting forth the principles and methods of application. She has consistently urged the inclusion of interested non-riparian, as well as riparian, states, and British delegates have been prominent in the work of the commissions. The existence, the powers, and the membership of these international organs of control are due in large measure to constant exertion on the part of Great Britain.³ Such commissions have been established almost universally throughout Europe, and the Act of the Conference of Berlin created a like régime for the Congo. Great Britain, however, prevented the application of this system to the Niger⁴ and made no effort to extend the principle to the rivers of North or South America. The Congo Commission never functioned, and Great Britain gave her sanction to its abolition in the treaty revising the General Act of 1885.⁵ So far as the rivers of Europe are concerned, however, international commissions with non-riparian and riparian representatives have come to be an accepted feature of the regulation of international rivers.

The United States, on the other hand, has not favoured the establishment of international commissions of the type sponsored by Great Britain. Far from seeking a place on the international commissions of Europe, she has refused when offered, and urged

¹ Treaty between Great Britain, &c., and Hanover for the redemption of the Stade Toll, 1861, *51 Br. and For. St. P.*, 27-32; treaty of 1863 for the redemption of the Scheldt Toll, *ibid.*, Vol. LIII, pp. 13-14.

² For the negotiations which preceded the conclusion of the separate treaties between the United States and Hanover (1861) and the United States and Belgium (1863) see MSS. in the State Dept. archives.

³ "British Policy and the Regulation of European Rivers of International Concern", *op. cit.*

⁴ Granville to Malet, Foreign Office, November 7, 1884, No. 1, Africa No. 8 (1884), *Br. Parl. P.*, 1884-5, Vol. LV.

⁵ *Br. and For. St. P.*, Vol. CXII, pp. 901-8.

to accept, a seat.¹ For the regulation of the rivers of North America she has secured the creation of joint commissions with membership limited to the riparian states, and with powers directed not so much to the details of the regulation of navigation as to its maintenance and the settlement of disputes. Such a commission was established first between the United States and Mexico, and later between the United States and Great Britain.²

The negotiation of conventions embodying general principles applicable to a large group of, or to all, rivers, has been advocated by Great Britain. Beginning with the provisions of the Act of the Congress of Vienna, she has favoured this method of procedure. Owing to American opposition, she was successful only to a limited extent in obtaining a declaration of general principles in the Treaty of Versailles.³ She was forced to wait until the Conference of Barcelona to secure the complete fulfilment of her programme.⁴

The United States has steadily opposed the conclusion of general treaties of any type. Even when willingly taking part in the redemption of the tolls on the Scheldt and Elbe, she declined to sign the general treaties, preferring separate arrangements with the country most directly concerned. The action of the American delegate in signing the General Act of the Congress of Berlin, despite the warning of the Secretary of State, was subsequently repudiated, the United States concluding a separate agreement with King Leopold as sovereign of the Congo Free State.⁵ The vote of the Senate in 1930, advising American ratification of the treaty revising the General Act (1919), constitutes a violation of the traditional policy in this respect.⁶ The United States was not officially represented at the general conference called to discuss the redemption of the Elbe, or the Scheldt, dues. She was represented in the negotiations relating to international rivers at the Peace Conference of 1919 as part of the general peace settlement, but confined her exertions largely to a protection of American interests. She did not participate in the Conference of Barcelona.

¹ Minutes of the 8th and 9th meetings of the commission on ports, waterways, and railways, D. H. Miller, *My Diary at the Conference of Paris with Documents*, XI. 299, 303.

² Art. 1, treaty of 1889, 26 *U.S. Stat. at L.*, 1513; Arts. 7-10, treaty of 1909, *U.S. For. Rel.*, 1910, 535-8.

³ For British and American positions at the Congress of Versailles, see minutes of the meetings of the commission on the international régime of ports, waterways, and railways, and of the second sub-commission, D. H. Miller, *op. cit.*

⁴ Great Britain accepted the more liberal of the two optional clauses of the Barcelona Convention: 116 *Br. and For. St. P.*, 546.

⁵ *U.S. For. Rel.*, 1885, pp. viii-ix; treaty of 1891, 27 *U.S. Stat. at L.*, 930.

⁶ *Cong. Record*, Vol. LXXII, No. 92, 71st Cong., 2nd Sess.

At the Paris Peace Conference, the American delegation opposed the British proposal for a convention embodying general principles applicable to all rivers. Among other reasons, it was argued that in view of the wide diversity in conditions governing individual rivers, any convention broad enough to cover all cases would be too broad to be of great practical value. Principles acceptable in Europe might be entirely inapplicable to non-European rivers. Moreover, conditions on the rivers of North America led the American delegation to call attention to the fact that needs of navigation are not the only subjects to be considered in regulating an international river. Other uses, such as irrigation and the generation of electrical power, are already of greater importance in some cases, and are likely to become increasingly so in the future. The United States has therefore disputed the wisdom of a general convention, on the ground that it may very shortly prove an impediment to progress.¹

The United States has been a leader in the work of exploration, insisting that before a river can be regulated it must be known. The American Government sent expeditions to the Amazon and to the Plata, and demonstrated to the world for the first time that these great rivers and their main tributaries were navigable by steam vessels.² An American vessel, the *Susquehanna*, ascended the upper waters of the Yang-tze-kiang, and the navigability by steam of the Amur was also investigated. It was an Anglo-American expedition, led by Henry M. Stanley, that first determined the course of the Congo, and precipitated the international scramble for possession.³ The United States constantly urged the exploration and survey of the Mississippi to determine its source.

V

Conclusions.

In the process of shaping the law governing international rivers, Great Britain and the United States by their policies have

¹ Miller, *op. cit.*

² An exploring expedition was sent to the Amazon in 1851 and to the Plata in 1853. For a report of the Amazon expedition, see *House Ex. Doc. 43, 32nd Cong., 2nd Sess.* Details of both expeditions are contained in the archives of the State and Navy Departments.

³ Great Britain sent an exploring expedition to the Congo in 1816, but all the leaders and part of the crew perished: *Narrative of an Expedition to explore the River Zaire, usually called the Congo, in South Africa, in 1816, under the Direction of Captain J. K. Tuckey, R.N.*, published by John Murray, London, by permission of the Lords Commissioners of the Admiralty, in 1818.

contributed largely. Though there is some diversity of opinion, it is generally agreed that International Law accords no absolute legal right of navigation on any international river apart from that derived from treaty or other express agreement, at the same time recognizing a moral claim on the part of the upper riparian. Great Britain, by her insistence that freedom of navigation was purely a conventional right, helped to establish the treaty-right basis of this rule. The United States, by championing the natural right of an upper riparian under certain specified circumstances to reach the ocean, added the moral claim of the upper riparian.

THE MEANING OF THE TERM "DENIAL OF JUSTICE"

BY G. G. FITZMAURICE

I

To few terms in international law have such a wide variety of meanings or shades of meaning been attributed as to the term denial of justice. The difficulty of arriving at any definite understanding as to the type of meaning even which the term ought to bear has recently been brought into renewed relief by the failure of the Hague Codification Conference of 1930 to agree upon a draft convention concerning the responsibility of states. The meaning to be attached to this term was not the least of the difficulties on which the Conference broke down. Not only was it impossible to arrive at any precise definition, but the very bases of an agreement concerning the kind of meaning to be attached to the term were lacking.

The causes of this lack of agreement appear to be of a political rather than a legal character and are to be found in the existence in the world of two main groups of countries. The first group consists of "creditor" or "plaintiff" states, whose independence and civilization are established, whose institutions are strong and whose courts relatively impartial; who lend money to other countries for their development and whose nationals are accustomed to carry on business abroad. The other group consists of "debtor" or "defendant" states, whose independence and civilization are relatively recent, whose institutions are often weak and whose courts are not infrequently under the control of the executive or at the service of purely national interests, who borrow money for their development and are largely aided therein by the knowledge and experience of foreigners. The combination, in this latter group of countries, of the presence of numbers of foreigners carrying on business with the existence of weak or corrupt courts and institutions at whose hands they suffer, has led to a multiplicity of claims on the part of the governments of the former states against the latter. In the nature of things the majority, though far from all, of these claims have been based on the allegation that a denial of justice had occurred, and for this reason it appears that in certain quarters the notion has sprung up that the allegation of a denial of justice constitutes the sole admissible basis for a claim by a state in respect of an injury to the person or property of one of its

nationals. Once this idea had gained currency it was obviously to the interest of certain countries to attribute a wide meaning to the term, while other countries sought to give it as restricted a meaning as possible. Hence, on the one hand the interpretation which appears to include all those acts or omissions which may render one state internationally answerable to another for injury to a foreigner, and on the other the very restricted interpretation which seeks to confine the term, e.g. to a simple refusal to allow the injured party to have access to the courts.

It is clear that the idea that a denial of justice forms the sole basis for an international claim really involves a species of *petitio principii*, or rather, it leaves matters where they stand, inasmuch as it then becomes necessary to define denial of justice. The idea is, moreover, unsound, because, as will be shown, it leads on the one hand to obviously strained and artificial definitions of the term, in the effort to make it cover as much as possible; while on the other it gives rise to definitions so narrow that if adopted, the whole foundation of the law concerning the responsibility of states would for all practical purposes be destroyed. It is, therefore, necessary at the outset to reject the idea that denial of justice and state responsibility are co-extensive, and to put the discussion of the meaning of denial of justice on its true basis, which is one of terminology rather than of substantive rights.

Within the extremes noticed above there exist, of course, other possible meanings of the term, the precise degree of validity of which is less easy to determine. It will be convenient to make mention at this stage of two at least of these, which appear to constitute reasonable interpretations of the term. The first and narrower limits it to improper actions *on the part of the courts*, involving the responsibility of the state. The other and wider extends it so as to include such actions *in or concerning the administration of justice*, whether on the part of the courts or of some other organ of the state.

II

It would probably be going too far to say that any serious attempt has ever been made to regard as covered by the term denial of justice any international delinquency whatever, including not only those committed in respect of the person or property of a foreigner but also all other illegal acts; although certain dicta appear very nearly to amount to this.¹ It is only necessary to

¹ See below, p. 95, notes 1 and 2.

observe, in order to show that such an interpretation would be an abuse of the term, that on this basis such actions as the violation of a state's neutrality in time of war, a failure to pay intergovernmental debts, the omission to grant most-favoured-nation rights stipulated for in a commercial treaty, or the exercise of reprisals without a prior illegality on the part of the "offending" state, would all constitute a "denial of justice". The interpretation of denial of justice, however, which, while confining it to international delinquencies committed by a state in respect of the person or property of a foreigner on its territory, identifies it with the totality of such delinquencies, is, it would seem, only a slightly less indefensible stretching of the meaning of the term. This interpretation is stated by Hyde as follows:

"A denial of justice, in a broad sense, occurs whenever a state, through any department or agency, fails to observe with respect to an alien, any duty imposed by international law or by treaty with his country."¹

In the *Neer* case also, one of the arbitrators, Mr. Nielsen, stated that "A denial of justice may broadly speaking be properly regarded as the general ground of diplomatic intervention".²

The main objection to this definition of denial of justice is that it converts the term into a species of synonym for international delinquency, or, more accurately, for injuries to foreigners for which a state is, according to the rules of international law, responsible, and thus renders it largely meaningless and unnecessary; whereas, if used in a more restricted sense, the term has a definite value as describing a particular species of international wrong. As Eagleton says, "Under such circumstances [i.e. of the extended definition] the term 'denial of justice' would appear to be superfluous and confusing and proper to be eliminated".³ Scarcely less objectionable are the artificial concepts to which this definition leads. For instance, according to it a failure to provide adequate police protection resulting in the robbery of a foreigner would constitute a denial of justice; whereas, to give words their plain meaning, the real question here is not of a denial of justice

¹ *International Law*, I, p. 491. This definition as it stands would appear to cover the case of a tax imposed on a foreigner in contravention of most-favoured-nation rights granted by treaty to the state of which he is a national, or a refusal to allow him to carry on business in the country despite a treaty provision granting the right to do so. It is, however, limited by the context, and Hyde also recognizes that there is a narrower sense of the term denial of justice.

² U.S.—Mexican Claims Commission, *Opinions* 1927, p. 78. This dictum also, taken by itself, would appear to cover the cases instanced in the preceding footnote.

³ *The Responsibility of States in International Law*, p. 112.

but of a failure to provide adequate protection, and this failure is by itself sufficient to give rise to the responsibility of the state. To this it may be objected that if local remedies exist they must be pursued, and only if these result in a denial of justice will grounds for a diplomatic claim exist, so that the question is after all one of denial of justice. This, so far as it is the case, is irrelevant. In the first place it may well be and frequently is the case, even in highly civilized countries, that no method exists whereby the government could be sued in any court, ordinary or administrative, for a failure to provide adequate police protection. But even if a remedy did exist, the true position would surely be as follows. If redress were afforded, the responsibility of the state would be duly discharged. If, on the other hand, no redress were forthcoming it would become material to inquire why. If the reason were that the court had decided that the protection was, according to reasonable standards, adequate, or that in all the circumstances there was no negligence on the part of the authorities, this would amount to a finding that no wrong was ever committed, and unless the judgment were contrary to international law or appeared to be one which no court which was both honest and competent could have given, it would no doubt have to be accepted as final.¹ On the other hand, the failure of the court to give redress might be due to dishonesty or incompetency, i.e. might clearly amount to a denial of justice. But the original wrong of failing to provide adequate protection would not thereby be extinguished or merged in the denial of justice. It would still stand undischarged as the basis and ground of any claim which might be put forward; and the only effect of the subsequent denial of justice would be to create, not the *grounds* for intervention, but the *conditions* in which intervention could take place. In other words where there has been an original wrong on the part of the state followed by a failure to redress it, amounting to a denial of justice, the denial may be a necessary condition of intervention, but it is not the ground of it.² Of course the original wrong may itself consist in a denial of justice (this controversial matter will be discussed later); but in the instance given above it is submitted that it did not, and that it is straining

¹ See below, section VI.

² The position is well stated by Hyde (*International Law*, I, p. 492) as follows: "In the examination of claims it becomes important to distinguish events which tend to show internationally illegal conduct on the part of a territorial sovereign from those which tend to show a failure on its part to afford a means of redress in consequence of such conduct. The former seems to establish national responsibility; the latter to justify interposition."

the meaning of words to describe as a denial of justice a wrong arising from a simple failure to provide adequate protection.

The above example will, it is hoped, serve to show the difficulty and confusion inevitably attendant upon the attempt to include under the head of denial of justice the totality of the acts and omissions which may render a state responsible for an injury to a foreigner. The difficulties occasioned thereby were pointed out in the *Chattin* case, in which the court made the following observation:

"How confusing it must be to use the term 'denial of justice' for both [sc. in effect, for all] categories of governmental acts is shown by a simple deduction. If 'denial of justice' covers not only governmental acts implying indirect liability [sc. failure to provide redress] but also acts of direct liability [sc. original wrongs], and if, on the other hand, denial of justice is applied to acts of executive and legislative authorities as well as to acts of judicial authorities—as is often being done—there would exist no international wrong [sc. in respect of the person or property of a foreigner] which would not be covered by the phrase 'denial of justice' and the expression would lose its value as a technical distinction." ¹

The only criticism to be made of the above dictum is that it implies that an original wrong can never be in the nature of a denial of justice, and that only the secondary wrong of failing to redress a primary or original wrong can have this character. As will be shown later, there is reason to believe that this is not the case. But, assuming for the present that it may be true, it is clear that it can only be so (and this is where the above judgment is obscure) if under primary or original wrong be included not only original wrongs committed by the state through its organs and agents, but also wrongs committed by private citizens for which the state has no direct responsibility (i.e. for which its sole responsibility is to provide redress). In this sense it is at least possible, even if unsound, to maintain that a denial of justice can only take place where there has been some sort of prior wrong either on the part of the state or of a private individual.² But unless the above dictum be interpreted in the manner indicated, it is misleading. An example will make this clear. *A*, a foreigner, sues *B*, a native, for goods sold and delivered. The court being clearly biased against *A* because he is a foreigner improperly gives judgment in favour of *B*. This is a denial of justice. It also constitutes, so far as the state is concerned, an original or primary wrong on

¹ U.S.—Mexican Claims Commission, *Opinions*, 1927, p. 427.

² As one of the arbitrators, Mr. Pound, said in the British and American claims arbitration under the Special Agreement of August 18, 1910, (*Nielsen's Report*, p. 258); "First there is an injustice [sc. on the part of the state or private citizen] antecedent to the denial [of justice] and then the denial after it."

which a claim can be founded. There does exist, it is true, an even earlier wrong (the failure to pay), but it is not the state's. No doubt before the claim can be actually put forward the matter must go to appeal if an appeal be provided by the local law, and, if the appeal also results in a denial of justice, a secondary wrong by the state (the third wrong altogether) will have occurred in the further failure to provide redress. But it will be the original wrong of the state (in this case also a denial of justice) which will give rise to responsibility and on which the claim will be founded. Similarly, where a foreigner is murdered in circumstances involving no negligence on the part of the authorities, but where no attempt is made to apprehend or punish the offender, it may be said, at any rate according to one very reasonable interpretation of the term to be discussed later, that a denial of justice has occurred, and this denial of justice constitutes, so far as the state is concerned, a primary and original wrong. There is a prior wrong (the murder) but it is not a prior wrong on the part of the state. The matter is correctly summarized by Eagleton as follows:

"Denial of justice is the failure to make reparation through local agencies of redress for an injury suffered by an alien. Where such injuries [sc. primary original wrongs] emanate from agents of the state, the denial of justice is a re-affirmation of responsibility: where they emanate from individuals, denial of justice is the original establishment of responsibility [sc. of the state's responsibility.]"¹

It will be seen that Eagleton too takes the view that a denial of justice consists in a failure to redress some kind of prior wrong.²

III

It appears now to be possible to formulate the proposition that, whatever may be the precise definition to be given to denial of justice it ought at any rate to be one which limits the scope of the term to improper acts or omissions involving the responsibility of the state in some way connected with the administration of justice, whether on the part of the judiciary itself, or of some other organ of the state.³ This definition may itself be too wide—that is the point next to be examined—but at any rate nothing wider would seem to be admissible.

Various meanings have been attributed to the term within the

¹ *A.J.I.L.*, 1928, Vol. 22, p. 538, at pp. 558–9.

² The correctness of this view is discussed in Section V.

³ This of course does not mean that only acts or omissions connected with the administration of justice can involve the responsibility of the state, but only that these alone can properly be termed denials of justice.

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above limit, all of them based on the view that a denial of justice must in some way be connected with the process of administering justice. Certain of them, however, are very narrow; in particular the one to which attention has already been drawn, and which in effect limits the term to a refusal to do justice. Such a refusal might occur owing to a denial to foreigners of access to the courts, or to a failure on the part of the local law to provide any remedy in a case where the laws of all civilized countries provide remedies. But, as such instances are rare, what is usually understood by a refusal to do justice is a refusal on the part of a court to entertain a case which is within its jurisdiction, or to render a decision therein. This restrictive interpretation of denial of justice has been put forward *inter alia* by certain Latin-American states. Thus Article 40 of the law of Salvador of September 29, 1886, provides:

"It is to be understood that there is a denial of justice only when the judicial authority refuses to make a formal declaration upon the principal subject or upon any incident of the suit . . . consequently the fact that the judge may have pronounced a decision or sentence, in whatever sense it may be, although it may be said that the decision is iniquitous or given in express violation of law, cannot be alleged as a denial of justice."¹

It is similarly provided in Articles 34 and 35 of the law of Honduras of April 10, 1895 that:

"Aliens may not have recourse to diplomatic intervention except in case of denial of justice, and after having in vain appealed to the ordinary means provided by the laws of the Republic.

"Denial of justice is understood when the judicial authority refuses to make a formal declaration concerning the principal matter or any of the incidents of the case . . . consequently by the mere act of the judge giving a decision or sentence in any sense, denial of justice cannot be asserted, although it may be said that the decision is iniquitous or contrary to law."²

This view has recently been re-affirmed in the Report of the Guerrero sub-committee of the Committee of the League of Nations on Progressive Codification.³

"Denial of justice is therefore a refusal to grant foreigners free access to the courts instituted in a state for the discharge of its judicial functions, or the failure to grant free access, in a particular case, to a foreigner who seeks to defend his rights, although in the circumstances nationals of the state would be entitled to such access."⁴

and:

"The decision of a judicial authority, in accordance with the *lex loci*, that a petition submitted by a foreigner cannot be entertained should not, however, be

¹ *State Papers*, Vol. LXXVII, p. 116.

² *Ibid.*, Vol. LXXXVII, p. 707.

³ *Publications of the League*, C. 196, M. 70, 1927 Vol. I [C.P.D.I. 95 (2)].

⁴ *Ibid.*, p. 100.

regarded as a denial of justice. The state has fulfilled its duty by the very fact that the local tribunal has been able to give a decision regarding this request.”¹

The same view has apparently been put forward by no less an authority than Judge Anzilotti:

“While an unfavourable outcome of a trial is never in itself a denial of justice, yet a refusal to grant foreigners access to judicial channels must be so regarded . . . The international obligation of a nation is therefore performed once the foreigner has been enabled to secure a declaration by the proper court as to whether his suit is entertainable or not.”²

It is clear that, according to this view, nothing short of a refusal or failure on the part of a court to hear a case or to give judgment therein can constitute a denial of justice. Provided the court renders any decision at all, even a decision to the effect that it has no jurisdiction, a denial of justice cannot be alleged, although it may be possible to establish clearly that fraud or bribery has occurred, or that the court has been guilty of gross bias, or of a flagrant abuse of its own procedure, &c. This view of denial of justice amounts in effect to a claim on the part of the country which puts it forward to attribute to the judgments of its tribunals an absolute and unassailable validity on all questions of municipal and international law coming before them. That this is the claim is clear, e.g. from the opening passage of the section on acts performed in the exercise of judicial functions, in the Guerrero Report:

“If there is one general principle concerning which there can be no discussion it is respect for the majesty of the law. As between self-respecting states there can be no greater insult than to question the good faith of municipal magistrates in their administration of justice.”³

The same point emerges from a decision of the Supreme Court of Peru, although the view here taken is somewhat broader:

“There is no doubt that nations reciprocally owe one another justice and are bound to extend it to foreigners having recourse to their tribunals, and to give them the opportunity to obtain it in the like measure with nationals: but the good understanding among them, harmonizing all interests, has raised to the category of a rule of international law the authority of the thing adjudged, and no self-respecting country will countenance that any other country should impeach the force and legality of an executed judgment rendered regularly by its authorities, as an emanation of sovereignty. . . .

“In the relations of nation to nation the rule is respect for the sovereignty of friendly powers, typified in the authority of its judges and of its decisions. The exception is the claim based on the motive of denial of justice, but to make such claim conformably with the principles and usages of international law it is

¹ *Ibid.*, p. 99.

² *R. G.*, XIII, p. 22.

³ *Loc. cit.*, p. 98.

necessary that the case be one of the utmost seriousness, that the denial of justice be manifest or notorious, that is that the hearing which the foreigner claims or the recourse which he interposes has been denied him and in general that the exercise of his rights and right of action is interfered with contrary to law or is subjected to unwarranted delays; because all this involves and constitutes an odious exception, a legal infringement which can be established objectively without offending the jurisdiction of the country and which compromises the responsibility of the State. . . .

"Of what then does he complain? Of not having won the action? It is not on that condition nor on any other that the portals of justice are thrown open to the public authorities, to foreigners, or to any one else."¹

It is submitted that the view that denial of justice is confined to a refusal to allow foreigners access to the courts or to the failure of a court to render a decision cannot be accepted, because its effect would be to render the whole idea of denial of justice, if not meaningless in theory, at any rate of no further practical utility. In nearly every country foreigners have access to the courts on the same terms (subject perhaps to the giving of security) as nationals. All courts moreover render decisions of some sort. The question cannot, therefore, be limited to whether the court has given a decision; or the opportunity for abuse is palpable. It is the nature of the decision which matters. The point might become one of mere terminology, and as such relatively unimportant, if the advocates of this theory were prepared to concede that while the term denial of justice, as a term, must be limited, e.g. to the refusal of a court to entertain a case, yet a dishonest judgment is a good ground for an international claim, though it must be termed something other than a denial of justice. This is the view taken by Charles de Visscher:

"Le déni de justice, dans le sens propre du terme, implique le refus par l'Etat d'accorder aux étrangers la protection de leurs droits par le recours aux tribunaux . . . la responsabilité de l'Etat peut, dans des cas d'ailleurs assez rares, se trouver engagée à l'occasion de sentences prononcées par les tribunaux; mais ce n'est plus là le déni de justice; il y a justice rendue et non justice déniée."²

However, this view is far from being the one usually put forward. In the Guerrero Report, for instance, not only is denial of justice limited to cases of a refusal to do justice, but the responsibility of states is in its turn limited to cases where a denial of justice has occurred.³ It is clear that at this point the matter really leaves the sphere of law, and enters the realm of politics.

¹ 1927. 23 *Anales Judiciales* (Peru), 493; *Annual Digest of Public International Law Cases* 1927-1928, Case No. 149, p. 221.

² *La Responsabilité des Etats*, Biblioteca Visseriana, II, p. 99.

³ "In conclusion therefore we infer that a state . . . incurs international responsibility only if it has been guilty of a denial of justice as defined above" [*loc. cit.*, p. 100].

The contrary view to that contained in the passages above quoted, the view namely that a state is as much responsible for the improper actions in general of its judicial organs as of its other organs, and that no unassailable validity can be claimed for the judgments of municipal courts, has recently received an interesting re-affirmation in a decision dated June 30, 1930, given by three Swiss jurists sitting at Lausanne in an arbitration between Germany and Portugal in respect of claims arising out of war damage, in which it was laid down that:

"L'Etat . . . est responsable de ses tribunaux de prises comme des autres autorités qui agissent en son nom. Si la décision d'un tribunal de prises est contraire au droit des gens *ou si elle est manifestement injuste* . . . elle peut engager la responsabilité de l'Etat . . . et faire l'objet d'une réclamation."¹

The same view was affirmed by Mr. Nielsen in the *Neer* case:

"Although there is this clear recognition in international law of the scope of sovereign rights relating to matters that are the subject of domestic regulation, it is also clear that the domestic law, and the measures employed to execute it must conform to the requirements of the supreme law of members of the family of nations, which is international law, and that any failure to meet these requirements is a failure to perform a legal duty and as such an international delinquency. Hence a strict conformity by the authorities of a government with its domestic law is not necessarily conclusive evidence of the observance of the legal duties imposed by international law, although it may be important evidence on that point."²

IV

Having considered the meanings of the term denial of justice which appear clearly to be inadmissible because they are either too broad or too narrow, it is now necessary to turn to those meanings which can be said, each in its way, to be valid. Two especially, both of which keep within the limit indicated at the beginning of the preceding section, require consideration. According to the first, a denial of justice consists in some improper act or omission on the part of the courts or judiciary involving the responsibility of the state. It is to be noted in the first place that according to this meaning, denial of justice does not necessarily

¹ See page 26 of the decision of June 30, 1930, published by the *Imprimerie de la Société de la Gazette de Lausanne et Journal Suisse, Lausanne*. Although this dictum only relates specifically to prize courts, it will be observed that it is *not* confined to cases of the misapplication of international law; it would therefore seem to cover the case of municipal courts generally. The italics in the above text are not in the original.

² *Loc. cit.*, p. 77. This dictum is of course also an interesting affirmation of the validity of the doctrine of the international standard.

cover *all* such acts or omissions; it is merely limited to them. There may be acts or omissions of the judiciary which involve the responsibility of the state, but yet do not constitute a technical denial of justice (and according to the view that a denial of justice always consists in a failure to redress a prior wrong, this is the case; this point is discussed in the succeeding section). Secondly, it is clear that this meaning is intended to include something more than a mere refusal on the part of the court to hear a case or render a decision, or it would not differ from the one noticed in the preceding section. Without attempting any enumeration of the acts or omissions which are intended to be covered by this interpretation of the term denial of justice, it may be said that they include not only a failure to hear a case, but all other palpable irregularities on the part of a court, e.g. a flagrant abuse by the court of its own rules of procedure, the extraction or procuring by the court of evidence by forcible or fraudulent means, or by threats or bribes, &c., and finally the delivering of a judgment which no honest and competent court could have given (though not a mere erroneous judgment if given in good faith—see below section VI). On the other hand the definition, so far as it is a definition, is limited to acts of the courts, or of the judiciary acting as such. It does not cover the improper acts of judges or of court officials acting in their private capacity, for such acts do not *per se* involve the responsibility of the state at all. If a judge steals money paid into court, the state's responsibility only arises on a failure to take all possible steps to apprehend and punish him, unless indeed the act of the judge can be attributed to negligence on the part of some official, but in that case it is the official's negligence, and not the judge's act which gives rise to responsibility.

According to the second meaning referred to above, which includes the first, a denial of justice consists in some (though again not necessarily every) improper act or omission involving the responsibility of the state in, or connected with, the administration of justice, whether on the part of the judiciary or of some other organ of the state.¹ Used in this sense the term covers, not

¹ It need hardly be said that both meanings are concerned purely with what constitutes a denial of justice, and in no way purport to identify denial of justice with state responsibility, or to regard the former as the sole basis of the latter. The fallacy of this notion has already been noticed. As Eagleton has said (*The Responsibility of States in International Law*, p. 113): "The obligation which a state bears towards aliens includes other duties than mere regularity of action on the part of its local courts"—or, it may be added, than mere regularity in connexion with the administration of justice.

only wrongs inflicted in the actual course of a trial or lawsuit, but also other wrongs connected with the administration of justice, including those inflicted before or after a trial. The term in this sense therefore would include *inter alia* cases of failure on the part of the legislature to provide a legal remedy where, according to the ordinary standards of civilized countries, legal redress ought to be available, a denial to a foreigner of access to the courts, or obstructions placed in his way by executive officials, the unwarrantably long detention of an accused person before he is brought to trial, unwarrantable delay in hearing and determining a suit, the execution of an accused person without trial, failure to bring a guilty person to trial or to institute proceedings against him, the giving of inadequate punishment to a guilty person, failure on the part of the executive to enforce a judgment duly rendered by the courts in favour of a foreigner, &c.

It would be idle to enter into a discussion as to which of these two interpretations constitutes the sense in which the term denial of justice ought most properly to be understood. Each is valid in its way, and all that can profitably be said is that anything narrower than the first or broader than the second would appear to be inadmissible. In any event the matter is one mainly of terminology, since both definitions purport only to describe what is covered by denial of justice, and do not attempt to define the responsibility of states in general. As a matter of terminology then, it may be said that the first definition probably represents the natural meaning of the term. As has been said, "denial of justice, at least when the expression is used by a lawyer, naturally connotes the instrumentalities whereby, normally, justice is secured, that is to say courts and judicial procedure".¹ The layman also probably envisages a denial of justice as some failure on the part of the courts, and in particular that failure which consists in the delivery of an obviously dishonest judgment. It is, indeed, in connexion with judgments that the question of denial of justice by far the most frequently arises, so much so that in many minds denial of justice is practically identified with dishonest judgments. This at any rate is clearly too narrow, for a court may deny justice in other ways than by delivering a dishonest judgment.² But in

¹ *Proceedings of the American Society of International Law*, IV (1910), p. 128.

² It is, however, admittedly improbable that any judgment which is preceded by gross irregularities will be honest; and it is often very difficult to say whether the denial of justice consists in the prior irregularity or the subsequent judgment, or both. The position not infrequently is that the prior irregularity constitutes the main evidence which goes to show that the judgment cannot have been honest. Or the position may be

any case it seems that, whatever the purely natural meaning of the term may be, a wider signification must be allowed to denial of justice than a simple failure on the part of the courts. If, for instance, the legislature omits to provide a remedy in a case where, according to civilized standards, a remedy ought to be provided, so that a foreigner is unable to obtain redress for an injury for which he could obtain redress elsewhere, this is surely quite literally a denial of justice to him. Similarly, if the executive obstructs him in his access to the courts, or imprisons or executes him without trial,¹ or prevents him from duly executing a judgment given in his favour in the courts, there is a denial of justice. Borchard has summed up the matter thus:

"Any defect, not merely in the judicial process, but in the remedial process as a whole . . . would seem equally to constitute a denial of justice in the remedial sense."²

V

It will be seen that in the passage just quoted Borchard (though he does not actually say so) appears to lean to the view that a denial of justice only occurs where there is some failure to redress a prior wrong on the part of somebody, either the state or a private individual. The same view is taken by Eagleton in a passage already quoted,³ and in the *Chattin* case,⁴ and it has been referred to more than once in the course of this article. It is now necessary to consider whether this view is correct. While the writer believes it to be in fact incorrect, his object is less to prove it so than to show it to be based on a particularly barren distinction of no practical utility, even if of theoretical validity (which is doubtful). In any case the question is, whatever view be adopted, one of pure terminology, since no one pretends that the possibility that the term denial of justice ought only to be used in connexion with cases of failure to redress some prior injury means that the state is not also responsible for primary or original that it is not the judgment which constitutes the denial of justice, but the fraud or dishonesty, &c., of the court, of which the judgment is merely evidence.

¹ This example is included here because it affords a good illustration of the particular question at issue. It raises, however, in acute form, the parallel question, to be discussed in section V, of whether a denial of justice can consist in some improper action other than a failure to afford redress for a prior wrong.

² From a recent article in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, (Teil I) I, 223-50, 1929. The later part of the article (see below, p. 109) makes it clear that Borchard doubts the soundness of the view in question.

³ *Supra*, p. 98; and see generally Eagleton, *A.J.I.L.*, 1928, Vol XXII, pp. 553-9.

⁴ *Supra*, p. 97.

wrongs committed by its agents, legislative, executive or judicial, by whatever name these be called. The question is merely whether any of these primary wrongs can ever properly be termed a denial of justice, or whether this term must be reserved entirely for secondary wrongs.

Before embarking on the discussion, however, it should be observed that the inquiry on this point will not, whatever be its outcome, affect the validity or lack of validity of the interpretations of denial of justice already considered. The question is really a parallel one and arises, for instance, in connexion with both the interpretations discussed in the preceding section.

It will be convenient to begin by inquiring how far it is true to say that a denial of justice committed by the executive or legislative organ of the state in connexion with the administration of justice necessarily consists in a failure to redress a prior wrong. This is no doubt the fact in the vast majority of cases, but it is surely not invariably so. One obvious instance where it is not, to which reference has already been made, is the imprisonment or execution of an individual for an alleged offence, without trial. This is a wrong for which the state is responsible, and the wrong surely consists in a denial of justice to the individual in question; yet it does not consist in any failure to redress a prior injury. To argue that such an act constitutes an original *injustice* and not a (or an original) *denial* of justice is, it would seem, merely to juggle with words. The distinction, while it may be just perceptible to a lawyer, is not one likely to recommend itself to the man in the street. If it be asked "was the accused granted justice or not?", the answer is he was not, and if he was not granted it, then surely he was denied it. Hence, it would seem, the wrong consisted in a denial of justice.

Still more striking are certain cases involving wrongs by the legislature. No doubt the average case of a failure on the part of the legislature to provide a remedy, which, according to ordinary international standards, ought to be provided, is only brought into relief where some one is seeking redress for an injury. Persons in the position of defendants may well bless the absence of remedies. But it is easy to conceive of cases where it is desired to have recourse to the courts, not in order to redress a wrong, but to obtain a declaration of right or fact, e.g. a declaration that a piece of property belongs to the applicant, or a declaration that a marriage is valid, or a child legitimate, or simply to settle a dispute between two parties concerning the interpretation of a will

where neither has as yet wronged the other. Such cases are of daily occurrence. If the legislature fails to provide any means whereby they can be determined, this, if it be an international wrong at all, is surely a wrong coming within the category of denial of justice. It may, of course, be argued that at present such a failure would not constitute an international wrong at all, as the doctrine of the international standard does not absolutely require provision to be made for such cases. Even if this were true it would, so far as the theoretical validity of the argument goes, be irrelevant. But is it true? Can it be argued, for instance, that the international standard does not require any provision to be made whereby heirs who are disputing as to the meaning of a will may have its terms interpreted? If they cannot, they are surely denied justice, yet there is no question of a failure to redress a prior wrong.

Take again a country in which a divorce may be had by mutual consent without either party having to prove a prior matrimonial offence on the part of the other, and suppose two foreigners seeking a divorce to be permanently obstructed in their access to the courts by executive officials. Does not this constitute a denial to them of justice? Yet no question of a failure to redress a prior wrong is involved.

No doubt much depends on the meaning to be attributed to the word "justice". In its popular acceptation it may imply merely the notion of the righting of some injury. But in its legal sense it seems to cover much more than this.

It is now necessary to consider how far it is true to say of the judiciary also that every denial of justice on its part must necessarily consist in a failure to redress a previous wrong. In other words, is it the fact that a denial of justice can only occur *vis-à-vis* an alien plaintiff or appellant (who clearly is seeking redress for a prior wrong), and that a wrong similar in every respect committed *vis-à-vis* an alien defendant or respondent (who, evidently, is not seeking any such redress but is having it sought against him) is not a denial of justice but something which, though it may involve the responsibility of the state, is nevertheless to be called by some other name? The point is usually obscured by the fact that in nearly all cases an appeal lies, and owing to the familiar rule that all appeals must be exhausted before formal diplomatic intervention can take place, such intervention can, in fact, when the time comes, usually be based on a failure to redress a previous wrong, i.e. in the case of a defendant, on the improper failure, due e.g. to a lack of impar-

tiality, on the part of a higher court to redress the injury caused by a wrong judgment in a lower one. But it is possible to conceive a case where this would not be so. Imagine that *A* sues *B*, a foreigner, for money lent. The court quite properly decides in favour of *B*, it being clear that he never borrowed the money. *A* appeals. The court of appeal confirms the judgment. *A* appeals to the final court of appeal. This court, being clearly prejudiced against *B* on the ground that he is a foreigner, reverses the previous judgments, and condemns him to pay. Most people would say that this would constitute a denial of justice. Yet it would not consist in a failure to redress a previous injury done to *B*. On the contrary it would constitute an original wrong done to him.

This instance brings into glaring relief the unreality of the distinction between a denial of justice committed by the courts, and an original wrong or *injustice* committed by them. The distinction may be sound in theory, but it is unreal in practice. In either case there is a failure on the part of the courts to do justice, and in either case there is a failure to render to the injured party the justice which he had the right to expect in a court of law; in other words a denial to him of justice—be he plaintiff or defendant. But the distinction, even if it be valid in pure theory, becomes still more unreal when considered in connexion with the by no means unusual class of case, to which attention has already been drawn, where the parties before the court are neither plaintiff nor defendant, but as it were both—where each seeks to establish a right and to contest the other's right but without alleging any actual injury. If in such a case a court, e.g. the highest court of appeal, delivers a judgment against one of the parties, a foreigner, which obviously constitutes a flagrant piece of dishonesty, clearly involving the international responsibility of the state, can it be said with any real justification that the party in question has not suffered a denial of justice because there has been no failure by the court to redress a prior wrong (when none was asserted) and that the wrong committed by the court must be called by some other name?

The conclusion to be drawn seems to be that, at any rate for all practical purposes, every injury involving the responsibility of the state committed by a court or judge acting officially, or alternatively every such injury committed by any organ of the government in its official capacity in connexion with the administration of justice, constitutes and can properly be styled a denial of justice, whether it consists in a failure to redress a prior wrong, or in an

original wrong committed by the court or other organ itself. Borchard¹ appears to agree with this view:

"Whether it is technically possible or desirable to make the distinction where courts are involved between primary and secondary injuries, for example, whether it is practical to say where a mob or the executive controls the courts in a case where the alien is a defendant, that a denial of justice has not occurred, but only an 'unjust judgment', seems rather doubtful. Foreign Offices would probably not make the distinction, nor have international tribunals or writers generally."²

VI

No discussion of the meaning of the term denial of justice would be complete without a reference to one further question, in some respects the most difficult of all those connected with this topic. It has been observed³ that the layman probably connects denial of justice purely and simply with the idea of some improper judgment delivered by a court; and all the interpretations indicated above as admissible include, under denial of justice, an improper judgment. The qualification, however, is that it shall be an improper judgment involving the responsibility of the state. The question therefore arises what judgments are of this character, i.e. involve the responsibility of the state either because they constitute a denial of justice to an alien plaintiff or (to follow the theoreticians) because they constitute a manifest *injustice* to an alien defendant. For the purposes of this discussion the two cases will be treated as one, and the term denial of justice will be regarded as applying to both. The difference to be examined then, is that which exists between a judgment which is a denial of justice, i.e. which involves some element of actual bad faith on the part of the court, and one which is merely unjust. One involves the responsibility of the state and the other does not. It will, however, avoid confusion if, for the purposes of this argument, "erroneous" is substituted for "unjust", so that the discussion will be as to the difference between a denial of justice and a judgment which is merely erroneous in law or in fact, and there-

¹ See p. 105, note 2.

² Eagleton, however, does make the distinction (*A.J.I.L.*, Vol. XXII, p. 559); "The essential test for denial of justice lies in the question; has there been an antecedent injury to an alien for which he is now seeking redress? It would seem then that denial of justice can only appear where the alien is the plaintiff." Of course Eagleton does not mean that a flagrant "*injustice*" to an alien defendant cannot constitute an international wrong in respect of which a claim can be made, but only that it is not a "denial of justice"; see his remarks on p. 553. The whole matter is really one of pure terminology.

³ *Supra*, p. 104.

fore unjust. It is submitted that for practical purposes all unjust judgments can be regarded as erroneous in the sense of being bad in law or in fact, and that all erroneous judgments are unjust; though a cynic might dispute both propositions.¹

Before going any further it must also be stated that this discussion is only concerned with the judgments of municipal courts applying municipal law, and not with the judgments of municipal courts applying international law. It is generally admitted, and there is ample authority for the view,² that the judgments of municipal courts applying international law will, if they misapply international law, *ipso facto* involve the responsibility of the state (at any rate if acted upon) even though rendered in perfect good faith by an honest and competent court. The judgment of a municipal court misapplying international law is either *per se* a direct breach of international law (as where the courts of a given country assume jurisdiction in a case where according to international law the courts of that country have no jurisdiction) or it will lead to such a breach if duly acted upon by the state. In either case the state is internationally responsible for the breach if it occurs. The point clearly is in such a case that international law has in fact been broken, and the breach is none the less a breach because it was committed in good faith. For this reason much of the controversy concerning the propriety of scrutinizing the decision of a municipal court delivered in good faith which has centred round the arbitral decision in the *Costa Rica Packet* case, and which would have been perfectly relevant if the offending municipal court had been applying municipal law, is in fact irrelevant in so far as the municipal court's decision in that case related to a point of international law.

Subject to this proviso, the rule may be stated that the merely erroneous or unjust decision of a court, even though it may involve what amounts to a miscarriage of justice, is not a denial of justice, and, moreover, does not involve the responsibility of the state. To involve the responsibility of the state the element of bad faith must be present, and it must be clear that the court was actuated

¹ It is of course possible that a judgment which, under the municipal law of the country concerned, is good in law and in fact may in truth be unjust and even amount to a denial of justice because the municipal law itself is unjust. This case, however, is outside the above discussion because here the denial of justice, if there is one, is not really the act of the judiciary at all, but of the legislature in failing to provide reasonably just laws. The judgment does not really constitute the denial of justice, but is rather evidence of it, or, more strictly, the medium through which the denial of justice becomes apparent.

² See Germano-Portuguese arbitral decision of June 30, 1930 (*supra*, p. 102) for a recent reaffirmation of this view. (See also *infra*, p. 156.)

by bias, by fraud, or by external pressure, or was not impartial; or the judgment must be such as no court which was both honest and competent could have delivered.¹ It would be unwise to attempt any exhaustive enumeration of the factors which may give rise to responsibility in this connexion, and no such enumeration is here intended.

The above rule is easy to state, but involves great practical

¹ It hardly seems necessary to give authority for the proposition that mere error of fact or mere error in the interpretation of the national law does not *per se* involve responsibility, but the following passages may be of interest:

"Every nation should provide just and reasonable laws for the administration of justice; and it is equally a duty to provide means for their prompt and impartial execution. Reasonable diligence should be exercised in securing competent and honest judges. This done, the nation has no further concern than to see that they do not neglect their duties. . . . Every definitive sentence of a tribunal, regularly pronounced, should be esteemed just and executed as such. As a rule, when a cause in which foreigners are interested has been decided in due form, the nation of the defendants cannot hear their complaints. . . . It is only in cases where justice is refused, or palpable or evident injustice is committed, or when rules and forms have been openly violated, or when odious distinctions have been made against its subjects, that the government of the foreigner can interfere." (From the *Cotesworth & Powell* case, see Ralston, *Law and Procedure of International Tribunals*, pp. 82 and 86.)

"It being against the independence as well as the dignity of a nation that a foreign government may interfere either with its legislation or the appointment of magistrates for the administration of justice, the consequence is that in the protection of its subjects residing abroad a government, in all matters depending upon the judiciary power, must confine itself to secure for them free access to the local tribunals, besides an equality of treatment with the natives according to the conventional law established by treaties. Only a formal denial of justice, the dishonesty or *prevaricatio* of a judge legally proved, "the case of torture, the denial of the means of defence at the trial, or gross injustice, *in re minime dubia*" (see opinion of Phillimore in the controversy between the governments of Great Britain and Paraguay) may justify a government in extending further its protection." (From the *Medina* case, see Ralston, *ibid.*, p. 88.)

"It would be a calamitous and intolerable position that aliens in any country should be allowed to complain to their own governments that the local tribunals have erred in the interpretation of the law of the country. The judgments of such tribunals over matters within their jurisdiction are of final and conclusive force everywhere; there can be no concurrent jurisdiction in any extraneous body to interpret the law; nor can any appeal lie from such tribunals to any foreign body or Government." (From the award of the Chief Justice of the Orange Free State in a dispute between Great Britain and the Transvaal; *Pasicrisie*, 472.)

"I take it that international law recognizes the right of the authorities of a sovereign nation, particularly a court of last resort, to put the final interpretation upon the nation's laws. Possibly there may be an exception to this general rule in a case where it can be shown that a decision reveals an obviously fraudulent or erroneous interpretation or application of the local law. Domestic laws may contravene the law of nations, and judicial decisions may result in a denial of justice, but assuredly it is a well-recognized general principle that the construction of national laws rests with the nation's judiciary." (*Per* Nielsen in the *Garcia* case, U.S.—Mexican Claims Commission, *Opinions*, 1927, p. 173.)

difficulties in its application, which are considered below. The *rationale* of it is, however, plain. Judges are only human and they cannot be expected to be infallible. The universal existence of courts of appeal shows in fact that they are not expected to be infallible. Nor can there be an endless chain of appeals. Sooner or later the case comes to the highest court, and the judges of it, though presumed to be less fallible than others, are still liable to make mistakes. Put differently, it may be said that international law requires that every state a member of the family of nations shall provide good laws, and judges who are both honest and reasonably competent, because it is within the power of every state to do this by taking the necessary steps. But international law does not, because it cannot, require that judges shall never make mistakes. Consequently, if all that a judge does is to make a mistake, i.e. to arrive at a wrong conclusion of law or fact, even though it results in serious injustice, the state is not responsible.

There can be no question of the soundness of the above position. Yet, as every one who has had any practical experience of the matter knows, the rule that a state is not responsible for the *bona fide* errors of its courts can be, and all too frequently is, made use of in order to enable responsibility to be evaded in cases where there is a virtual certainty that bad faith has been present, but no conclusive proof of it. Moreover, the rule that the *bona fide* errors or injustices of courts do not entail responsibility is not infrequently construed as meaning that the state is not responsible for any judgment of its courts whatever, even if bad faith can be demonstrated. Some of the quotations contained in section III of this article illustrate the attitude in question, and this is the position clearly taken up in the Guerrero Report.

One of the chief difficulties in applying the rule that the *bona fide* errors of courts do not involve responsibility lies in the fact that the question of whether there has been a "denial of justice" cannot, strictly speaking, be answered merely by having regard to the degree of injustice involved. The only thing which can establish a denial of justice so far as a judgment is concerned is an affirmative answer, duly supported by evidence, to some such question as "Was the court guilty of bias, fraud, dishonesty, lack of impartiality, or gross incompetence?" If the answer to this question is in the negative, then, strictly speaking, it is immaterial how unjust the judgment may have been. The relevance of the degree of injustice really lies only in its evidential value. An unjust judgment may and often does afford strong evidence that the court

was dishonest, or rather it raises a strong presumption of dishonesty. It may even afford conclusive evidence, if the injustice be sufficiently flagrant, so that the judgment is of a kind which no honest and competent court could possibly have given.

The main difficulty, as already pointed out, is caused by the border-line cases of the type where there exists a serious injustice giving rise to a strong suspicion of bad faith, but where there is no actual proof of bad faith. It is the existence of this type of case and the frequency with which it enables governments to evade their true responsibilities which has led Borchard, after duly observing that mere error is not a ground for an international claim, to add that "In practice, however, governments have assumed an extended right to protest diplomatically against the judgments of foreign courts affecting their citizens when they considered the [sc. merely erroneous] decisions grossly unfair".¹ Oppenheim has similarly stated that "If a court observes its own proper forms of justice and nevertheless makes an unjust order or pronounces a materially unjust judgment, matters become so complicated that there is hardly a possible way in which the injured state can successfully obtain reparation for the wrong done unless the other party consents to bring the case before a court of arbitration".²

It seems clear that, notwithstanding the soundness of the rule that *bona fide* error does not entail responsibility, some latitude must be allowed to claimant governments to prefer and press claims in respect of judgments inflicting serious injustice, even though it may be difficult to prove conclusively that the court was guilty of something worse than an error. Possibly a solution of (and a sound theoretical basis for intervention in) these border-line cases may be found along the following lines. In almost all such cases it is probable that the court will have committed some more or less serious error, in the sense of a wrong conclusion of law or of fact. This suggests that the right method is to concentrate on the question whether the court was competent rather than on whether it was honest. The question will then be, was the error of such a character that no competent judge could have made it? If the answer is in the affirmative, it follows that the judge was either dishonest, in which case the state is clearly responsible, or that he was incompetent, in which case the responsibility of the state is also engaged for failing in its duty of providing

¹ *The Diplomatic Protection of Citizens Abroad*, p. 340.

² *International Law*, 4th ed., Vol. I, p. 304.

competent judges. If, on the other hand, the error was of a kind which a competent judge could reasonably have made, then, unless dishonesty can be shown, the state is not responsible. Admittedly, however, many gaps and difficulties remain. The question is really one of fact in respect of which no definite rule can be formulated.

NOTES

THE STATUTE OF WESTMINSTER

MERCHANT SHIPPING LEGISLATION.

THE purpose of the Statute of Westminster is to emancipate the Dominion Parliaments from most of the legal restrictions limiting their legislative competence, and for this reason its chief interest is constitutional rather than international. The Statute does not touch the more general questions of diplomacy, treaty-making, and the international sovereignty of the Dominions, which are still governed by existing practice and the resolutions of the Imperial Conferences. It is only in the matter of merchant shipping legislation that the new law suggests possibilities of international interest.

What the Statute has done in this respect has been to cut a very tangled knot. Imperial uniformity in matters of shipping and admiralty law is clearly desirable, and the only question is by what means this uniformity is to be attained. Until 1911 it was considered that uniformity was best secured by reserving to the Imperial Parliament a substantial monopoly of legislative competence. The Merchant Shipping Act of 1894 bound the whole Empire, and the law there laid down could only be varied by colonial legislatures within certain very narrow limits. The Colonial Courts of Admiralty Act (1890) was based upon the same principle, the competence of colonial legislatures being confined to a right to copy the contemporary English law.

In 1911 a new policy was initiated. The Maritime Conventions Act of that year altered the imperial law in conformity with an international convention, but left the Dominions free to adopt the alterations or not as they might think fit, and the same practice was followed in later statutes. The result was that we had neither liberty nor uniformity. The Dominions were not compelled to adopt the amendments of the imperial law, and they did not always do so. On the other hand, their general competence was still limited by the Acts of 1890 and 1894, so that they were not at liberty to make what laws they pleased. This abandonment of one principle without the substitution of another has resulted in a state of serious legal confusion, a confusion further aggravated by certain statutory exceptions, such as the provision in the Australian Constitution which permits the Commonwealth to legislate for Commonwealth shipping on "round voyages" beginning and ending in Australia.

The effect of the Statute of Westminster is to enable the Dominions to legislate freely upon all matters of merchant shipping and admiralty law in the same manner as the Imperial Parliament. For the future, therefore, uniformity of law upon these matters within the Empire can only be achieved by identical legislation based upon agreement, as if the Dominions were independent states. Again, it is now clear that the Dominions must accept direct responsibility for bringing their own law into harmony with international conventions. The liberty thus conceded, like any other liberty, is obviously capable of abuse, and the possibility of such abuse has been strongly emphasized by some commentators of distinction. But provocative suggestions of this kind are little calculated to promote the spirit of unanimity upon which for the future any common legal system must rest. The real safeguards against abuse are to be found, not in legal restrictions, but

in prudent policy, common patriotism, and common sense. The principle of maintaining uniformity by imperial authority was in effect abandoned in 1911, and it is obvious that no other solution of the problem was possible than that which has been embodied in the new Statute.

H. A. S.

THE STATUTE AND AUSTRALIA.

The criticisms directed in Australia against the Statute of Westminster were of two kinds: (1) objections by the States that the Statute would affect the relations between the States and the Commonwealth to the advantage of the Commonwealth; and (2) fears expressed that the Statute would weaken the imperial connexion and endanger the organic unity of the British Commonwealth of Nations.

One objection from the States was that the declarations protecting laws made by the Parliament of a Dominion from invalidity by reason of repugnancy to the laws of England, or by reason of extraterritorial operation, do not apply to State legislation. This limitation was intentional, no request having been made by any of the States for such an application of the principle. In Canada, the Provinces made some such request after the Imperial Conference of 1930, and by arrangement with the Dominion a provision has been inserted in Section 7 of the Statute, which extends to legislation of the Canadian Provinces the protection against invalidity for repugnancy, but does not authorize the extraterritorial operation of provincial laws.

Another objection by the Australian States was that the requirement of Section 4 of the Statute, that no British Act shall extend to a Dominion as part of the law of the Dominion unless its enactment has been requested and consented to by the Dominion, could be construed as giving the Commonwealth Government a veto on any request by a State for British legislation extending to the State. It was recognized that, in relation to matters within the exclusive power of the States, this objection had some weight; and at the instance of the Commonwealth Parliament it has been provided in Section 9 of the Statute that as to such matters the concurrence of the Commonwealth is not required in cases where it would not have been required by pre-existing constitutional practice.

Apart from these objections, a marked want of enthusiasm for the Statute was shown by many who, while admitting that Australia was practically committed to it by the Imperial Conference resolutions of 1926 and 1930, were not satisfied that the statutory implementing of the Balfour memorandum was either necessary or free from danger. This attitude led to the request of the Commonwealth Parliament that none of the operative sections of the Statute should extend to Australia unless adopted by the Commonwealth Parliament and that the adoption of any section might at any time be revoked. A similar request came from New Zealand and Newfoundland, and effect has been given to it in Section 10 of the Statute. It therefore rests with the Parliaments of these three Dominions either to accept to any desired extent the new statutory basis for Dominion status offered by the Statute of Westminster, or else to abstain from adopting any sections of the Statute, and to carry on, for as long as they like, on the footing of conventional recognition.

It is likely that Australia will adopt sections 2 and 3, which deal with repugnancy and extraterritorial operation, as each of those sections does enlarge

Dominion self-government. Similar considerations apply to sections 5 and 6, which remove restrictions on Dominion legislative power arising from particular provisions of the Merchant Shipping Act 1894 and the Colonial Courts of Admiralty Act 1890. There may be a disinclination to adopt Section 4, which makes a legal requirement of what is already an established constitutional practice. There is a strong current of opinion that in this respect it is not necessary to claim a right long conceded and never likely to be denied.

R. R. G.

THE PERMANENT COURT OF INTERNATIONAL JUSTICE— PROPOSED APPELLATE JURISDICTION

In July 1929 the Government of Finland placed on the agenda of the Assembly of the League of Nations a "Proposal to confer on the Permanent Court of International Justice jurisdiction as a court of review in respect of arbitral tribunals established by states", including the following draft resolution:

"The Assembly,

"Desirous of developing and fortifying the existing system of pacific settlement of international disputes;

"Recognizing the special authority of judgments of the Permanent Court of International Justice;

"Requests the Council to examine the question whether, and to what extent, there might be conferred upon the Permanent Court of International Justice jurisdiction as a court of review in respect of arbitral tribunals established by states, and to submit to the Assembly at a later session such proposals as it may desire to make."

The title of the proposal and the wording of the resolution were wide enough to cover a proposal to establish the Permanent Court as an international court of appeal from the decisions of "arbitral tribunals established by states", but the Finnish memorandum made it plain that nothing so far-reaching was intended. Reference was made to the "existing possibility of revision of an arbitral sentence or judgment by the tribunal which gave it" resulting from Article 83 of the Convention for the Pacific Settlement of International Disputes and Article 61 of the Statute of the Permanent Court, and the view was expressed that in view of this possibility and of the difficulty of repeating the evidence before another tribunal, "it would not seem that there could be any question of establishing an appeal tribunal in the proper sense of the term". All that the Finnish Government desired at that stage to propose was that "any dispute which may be raised in regard to an arbitral award duly rendered on the ground of the tribunal having been entirely without jurisdiction or having exceeded its powers, should be capable of being investigated by an authority recognized to have superior jurisdiction".

This proposal was referred to the First Committee of the Tenth Assembly, where it met with considerable criticism, particularly from the representative of the Netherlands, who argued *inter alia* that there were other reasons than lack of jurisdiction or action *ultra vires* which were already accepted as good reasons for the revision of an award. If, therefore, they proceeded to confer on the Court jurisdiction as a court of revision from the awards of arbitral tribunals in cases of lack of jurisdiction or action *ultra vires*, might there not be some danger that they would, in actual practice, be restricting instead of enlarging the possibilities of revision? The general feeling was, however, in favour of studying the means by which states could agree to use the Permanent Court as a tribunal of appeal

in these particular classes of cases, and the following resolution was ultimately proposed by the Committee and passed by the Assembly:

"The Assembly invites the Council to submit to examination the question: What would be the most appropriate procedure to be followed by states desiring to enable the Permanent Court of International Justice to assume in a general manner, as between them, the functions of a tribunal of appeal from international arbitral tribunals in all cases where it is contended that the arbitral tribunal was without jurisdiction or exceeded its jurisdiction?"

"The Assembly requests the Secretary-General to communicate the results of the above-mentioned study to the Governments of States which are Members of the League of Nations or signatories of the Protocol of Signature of the Statute of the Permanent Court of International Justice, with a view to discussion at a later session of the Assembly."

The Council accordingly referred the question to a committee composed of M. Gaus (Germany), M. Erich (Finland), M. Basdevant (France), M. Pilotti (Italy), and M. Rundstein (Poland), who presented their report in June 1930. While pointing out that the Optional Clause and Article 41 of the General Act furnished certain possibilities of judicial settlement of the difficulties in question, the committee defined its task as being "to investigate what procedure, apart from those two articles, would be most suitable for bringing disputes of the kind in question within the framework of the obligatory jurisdiction of the Court", and for this purpose they put forward three proposals, each of which was confined to cases where the award of an arbitral tribunal was alleged to be vitiated by absence of jurisdiction in the tribunal, the fact that the tribunal had exceeded its jurisdiction, or a fundamental fault in the procedure. The first alternative was a recommendation by the Assembly that the Members of the League of Nations should recognize as between themselves the compulsory jurisdiction of the Permanent Court to annul awards in such circumstances, and for this purpose should insert in their arbitration treaties, &c., certain provisions under which a state which disputed the obligatory character of an arbitral award on one of the grounds stated would be bound to submit such a claim to the Permanent Court, which would declare the award which was impeached to be null in whole or in part if it recognized the application to be well founded. The effect of such annulment would be to replace the parties in the legal position in which they stood before the commencement of the proceedings. The second mode of procedure suggested was the opening of a protocol to the same effect, to which all states could accede, while the third was a resolution by the Assembly, declaring it to be the duty of a state, which disputed the obligatory character of an arbitral award on any of the grounds stated, to propose to the other party the conclusion of a special agreement for the submission of the question to the Permanent Court. These three alternatives differed only in the procedure suggested with the object of ultimately bringing disputes of this character before the Permanent Court; the class of cases in which the Permanent Court was to have jurisdiction, and the nature of its powers in relation to the impugned award, were identical in each case.

The Council referred this report to the Assembly of 1930, but as the First Committee had not time to examine it properly, the matter was postponed to the Assembly of 1931. In that year, after a general discussion, from which it appeared that the third proposal of the committee set up by the Council met with no support in any quarter, the First Committee set up a sub-committee, which duly reported to it. Their report proposed a recommendation by the Assembly

that "in all cases where the Council, either in connexion with a claim for execution of an arbitral award or in other circumstances, finds that the validity of the award is disputed by one of the parties, the Council will invite the parties to conclude a special agreement for the submission of this contention to the Permanent Court of International Justice and, if unsuccessful in securing this result, will ask an advisory opinion from the Court", and a protocol under which any party who claimed that an award was "vitiating by a defect rendering it invalid" was to submit the claim to the Permanent Court. If the Court declared the existence of a defect affecting in whole or in part the validity of the award, the parties were to treat the award as not binding "in the measure in which its validity has been declared to be affected by such defect".

It will be seen that this proposal did not in any way limit, as the earlier proposal had done, the circumstances in which an award could be attacked on the ground of invalidity. The sub-committee considered that "in the present state of international law it was prudent to leave the determination of the causes which may render an award invalid to be effected by successive judicial decisions", though they added "in order to relieve certain apprehensions which may be felt" that "in the absence of an express provision for an appeal, an arbitral award could not be treated as invalid on the ground that the arbitral tribunal had wrongly applied the substantial law".

The discussion of this report by the First Committee made it reasonably clear that the sub-committee's work had proceeded on quite a different basis from that of the committee appointed by the Council. Whereas the report and proposals of the Council's committee appear to be based upon, or at any rate to be consistent with, the view that, as the law now stands, international arbitral awards, whatever their faults, are binding and unchallengeable, and that the task was, therefore, to provide a means by which awards vitiated by certain faults could be reviewed, the report and proposals of the sub-committee are clearly made on the basis that, even as the law now stands, certain awards (and, in particular, those where the arbitrator has misconceived the extent of his jurisdiction) are invalid. The result of this difference of view was that, whereas the proposals of the committee set up by the Council specified clearly a limited number of grounds upon which arbitral awards could be annulled by the Permanent Court of International Justice, the sub-committee left it entirely to the Permanent Court to decide on what grounds an award could be held to be invalid, by the application of the existing law. The view of the sub-committee, if accepted, would render it possible for any arbitral award to be challenged before the Permanent Court of International Justice, and would leave it entirely uncertain, until a number of references to the Court had resulted in the development of a considerable jurisprudence in the matter, to what extent arbitral awards were binding at all.

It is perhaps not surprising in the circumstances that the debate in the First Committee showed that it would be impossible to reach agreement on a proposal to be made to the Assembly, and the final result was the adoption by the Assembly of the following resolution, which is perhaps more eloquent in what it omits than in what it says:

"The Assembly:

"Noting the report of the Committee set up by the Council to study the Finnish proposal to confer on the Permanent Court of International Justice jurisdiction as a tribunal of appeal in respect of arbitral tribunals established by states;

"Noting also the report of the sub-committee of the First Committee, and

"Thanking both committees for their valuable work:

"Notes that thorough discussion of the question in the First Committee has shown that it presents many aspects on which sufficient light has not yet been thrown, and

"Decides to adjourn the question for examination at a later session."

It will accordingly be for the Assembly of 1932 to make another attempt to reach agreement on this question, and it is to be hoped that one result of the discussion will be to clear up the doubt which apparently exists at present as to the circumstances in which an arbitral award can properly be attacked on the ground of invalidity.

THE APPLICATION OF INTERNATIONAL LABOUR CONVENTIONS

It is perhaps worth while drawing attention to the first two decisions given by English courts upon the application of any International Labour Convention adopted by this country. A large number of these Conventions when adopted by Great Britain have involved no fresh legislation, because our existing law has been adequate to enable us to apply the Convention. In the case, however, of the "Draft Convention Concerning Unemployment Indemnity in case of Loss or Foundering at Sea" adopted at Geneva in 1920, it was necessary for Great Britain upon ratification to pass the Merchant Shipping (International Labour Conventions) Act, 1925.

The main article of the Convention is as follows:

Article 2. In every case of loss or foundering of any vessel, the owner or person with whom the seaman has contracted for service on board the vessel shall pay to each seaman employed thereon an indemnity against unemployment resulting from such loss or foundering.

This indemnity shall be paid for the days during which the seaman remains in fact unemployed at the same rate as the wages payable under the contract, but the total indemnity payable under this Convention to any one seaman may be limited to two months' wages.

The preamble of the Act of 1925 recites the adoption of the Convention which is scheduled to the Act and the necessity of giving effect to it, and section 1 of the Act enacts as follows:

1. (1) Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding anything in section one hundred and fifty-eight of the Merchant Shipping Act, 1894, but subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date.

(2) A seaman shall not be entitled to receive wages under this section if the owner shows that the unemployment was not due to the wreck or loss of the ship and shall not be entitled to receive wages under this section in respect of any day if the owner shows that the seaman was able to obtain suitable employment on that day.

(3) [Omitted.]

A question of interpretation soon arose in two cases which went up to the House of Lords together and are reported as *Ellerman Lines, Limited v. Murray; White Star Line, &c. v. Comerford*, [1931] A.C. 126. The facts in the two cases raise precisely the same point. In *Murray's* case the seaman's contract of service would, but for the wreck, have terminated on March 11, 1929. His ship was wrecked on February 27, 1929, and thereby his contract was terminated on that

date. In *Comerford's* case the contract of service would but for the wreck have terminated on December 11, 1928. His ship was wrecked on December 10, 1928, and thereby his contract of service was terminated on that day. In each case the seaman was unemployed for more than two months after the wreck, and the shipowner was unable to prove that the seaman could have obtained suitable employment during that period.

The seaman in each case thereupon sued the shipowner for two months' wages from the date of the wreck, and obtained a judgment in his favour from Lord Merrivale P., which was affirmed by the Court of Appeal by a majority (Scrutton and Greer L.J.J.; Slessor L.J. dissenting) and has now been affirmed by the House Lords—Viscount Dunedin, Lord Warrington of Clyffe, Lord Tomlin, and Lord Macmillan (Lord Blanesburgh dissenting). The shipowner in each case contended that the seaman was only entitled to wages up to the date when his contract would, normally and apart from the wreck, have terminated, and that, the text of the Act being ambiguous, it was permissible to look at the title of the Act, its preamble, and the contents of the Convention scheduled to it, from which it would appear (so it was argued) that the essence was the intention to *indemnify* the seaman against such loss of wages as the wreck might cause him (not exceeding two months' wages) and not to give him in cases such as the present a bounty as a result of the wreck, conditional only on his inability to find suitable employment. Slessor L.J. accepted this view, and Lord Blanesburgh, having arrived at the same conclusion upon other grounds, turned to the Convention "merely as a matter of interest" and found his conclusion to be in complete accord with it. The majority, however, both in the Court of Appeal and in the House of Lords, rejected the argument based on the word "indemnity", and the result was that each seaman recovered his two months' wages.

The point of general interest which seems to me to emerge from the two cases is this: In what circumstances, if at all, is it permissible when construing a statute passed in order to give effect to an International Labour Convention (or indeed, any treaty) to refer to the terms of the Convention itself? The answer to this question is tolerably clear. Scrutton L.J. was quite positive: "if the language of the statute is ambiguous, resort may be had to the language of the Convention to assist in interpreting the statute", [1930] P. at p. 201. Greer L.J. expressed the same view, [1930] P. at p. 209. Slessor L.J. was of the same opinion and based his dissenting judgment upon conclusions drawn from an examination of the language of the Convention. Viscount Dunedin did not deal expressly with the point but did not question the right, in case of ambiguity, to refer to the Convention. Lord Macmillan was willing to admit the right to refer to the Convention if any ambiguity had existed, but considered that in this case "only a sophisticated reading could import any ambiguity", [1931] A.C. at p. 148; while Lord Tomlin (at p. 167) said: "Nor do I think that, assuming there is any divergence between the draft convention and the Act, it would be proper to resort to the draft convention for the purpose of giving to the section a meaning other than that which in my judgment is its natural meaning", which leaves open the question of the permissibility of resort to the Convention if no natural and unambiguous meaning could be assigned to the words of the statute. (By "draft convention" is meant, of course, not the *travaux préparatoires*, but the Convention as finally adopted at Geneva and submitted to the various national authorities for adoption.) As we have seen above, Lord Blanesburgh referred to the Convention "merely as a matter of interest".

The conclusion which I venture to submit is that, when the statute is unambiguous, an English court will not look at the Convention, but that in case of ambiguity in the provisions of the statute it will consider itself to be at liberty to examine the Convention. I think that it is highly desirable that the court should in case of ambiguity refer to the Convention, because the essential object of these labour Conventions is to bring labour conditions in the countries adopting them up to a uniform standard. In some of these Conventions there is a direct element of reciprocity, for instance in that upon "Equality of Treatment for National and Foreign Workers as regards Workmen's Compensation for Accidents", but in all of them there is an implied obligation of uniformity in interpretation and application—at any rate in all those respects in which (as in the cases referred to above) divergences of interpretation would produce differences in labour costs. The element of international competition makes it reasonable that the cost to an employer of giving effect to a Convention should be as uniform as possible in all the countries adopting it.

A. D. McN.

TREATIES IN MUNICIPAL LAW—CANADIAN AUTHORITIES

Two interesting points relating to treaties have been raised in Canadian cases recently. The first dealt with the effect of a treaty which had not been implemented by legislation, upon subsequent provincial legislation which seemed in conflict with the treaty.¹ The second² had to do with the powers of the Dominion under section 132 of the British North America Act of 1867³ to legislate in matters that ordinarily would fall within the provincial field.

In the first case the Arrow River Tributaries Slide and Boom Co., Ltd., had improved sections of Arrow and Pigeon Rivers and proposed to charge tolls for the use of these improvements as provided under the Lakes and Rivers Improvement Act.⁴ The Pigeon Timber Company, Ltd., objected to the payment of these tolls on the grounds that by Article 3 of the Ashburton Treaty of 1842⁵ all water communications and all the usual portages on certain of the boundary waters, including sections of the Pigeon River, were to be free and open to the use of the subjects and citizens of both countries. In reply to this contention Mr. Justice Wright of the Supreme Court of Ontario stated:

"In Canada or any other British country, a treaty is deemed a contract or convention between the two nations and does not become a part of the law of the land unless by express act of the legislative body. It would appear that the Ashburton Treaty was never validated by statute of the Imperial Parliament or of the Dominion

¹ *Re Arrow River and Tributaries Slide Boom Co., Ltd.* (1931), 1 D.L.R. 260. On appeal (1931) 2 D.L.R. 216.

² *Re Aerial Navigation* (1931), 1 D.L.R. 13. On appeal (1932), 1 D.L.R. 58. *Re Regulation and Control of Radio Communication* (1931), 4 D.L.R. 865. On appeal [1932] A.C. 54.

³ "The Parliament and Government of Canada shall have all Powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards Foreign Countries arising under treaties between the Empire and such Foreign Countries." ⁴ Revised Statutes Ontario, 1927, c. 43.

⁵ "It being understood that all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods and also the Grand Portage from the shore of Lake Superior to the Pigeon River as now actually used, shall be *free and open* to the use of the subjects and citizens of both countries."

Parliament . . . it was never intended to enact and declare as law that the citizens of Canada should have access or right of navigation over the portion of the river under Canadian jurisdiction free from tolls or other regulations imposed by the legislation of their own Parliament. . . . The views of the text-writers on the subject of treaties and international law, as well as the cases referred to by counsel, have led me to the conclusion that in Canada . . . a treaty does not confer as between the state and the subject or as between subjects any rights upon the latter, and that under our constitution such rights can only be conferred by the Common Law of England or by legislative enactment of a duly competent legislature. Applying that principle to the present case it would appear that the Ashburton Treaty does not and was not intended to confer upon a citizen of Canada any right or authority as against the Government of Canada or against any other citizen of Canada."

For this reason Mr. Justice Wright held that as the Ontario Statute permitted the collection of tolls, the Arrow River Company could collect them.

On appeal, the judgment of the Appellate Division of the Ontario Supreme Court was delivered by Mr. Justice Riddell, who, while agreeing that "in British Countries treaties to which Britain is a party are not as such binding upon the individual subjects but only contracts binding in honour upon the contracting states", overruled Wright J. on the ground that

"the treaty was made with Her Majesty and is binding in honour upon Her Majesty's successor, his present Majesty. Consequently, the sovereign will not consider enacting anything that will conflict with his plain duty, unless the language employed in the statute is perfectly clear and explicit, admitting of no other interpretation . . . the King cannot be thought of as violating his agreement with the other contracting Power; and if the (Ontario) legislation can fairly be read in such a way as to reject any imputation of breaking faith, it must be so read, . . . to put it simply, placing His Majesty in the position of an honourable man who had agreed that another should have the right to pass over his land under water, could it be even imagined that he would either himself build such structures as are in question here or authorize another to do it? I think that the statute was not intended to and does not confer upon this company the right to build upon the bed of the Pigeon River anything which may interfere with the enjoyment of free and open use of it by the citizens of the United States."

This case raises, but does not answer satisfactorily, two interesting questions. One, granted that the executive may not in the exercise of its treaty-making power interfere with the rights of, or impose obligations upon private individuals, may it without the assistance of the legislature create rights, e.g. "free use of rivers", which cannot afterwards be affected by general legislation? This question is further complicated by the federal nature of the Canadian Constitution, for the proper legislature to implement treaties or to alter that legislation later is undoubtedly the Dominion Parliament, whereas, the subject-matter of the treaty may be, and here was, a matter for the provinces, and the Province of Ontario, there being no Imperial or Dominion legislation to the contrary, would seem to have the power to affect the rights and interests of Canadian citizens in Ontario. The second question depends on the nationality of the Pigeon Lumber Company (which is not specifically stated in the report), for, if it were an American company, then there seems to be no doubt that the views of Riddell J.A. are sound. If, on the other hand, it was a Canadian company, then Wright J.'s statement that "it (the Ashburton Treaty) was never intended to enact and declare as law that the citizens of Canada should have access or right of navigation over the portion of the river under Canadian jurisdiction free from tolls or other regulations imposed by the legislation of their own Parliament", seems to be correct, and his judgment providing that tolls should be paid presumably by Canadians to Canadians for improvements made in the Canadian section of an international

river, in accordance with a general Ontario statute, seems in line with legal principles.

The further general question is also suggested by the facts in this case, namely, what are the limits of the power of the executive to make treaties that are binding (a) as between state and state, and (b) between the citizens of a state, Canada, and another state, the United States? It is not proposed to deal with this question here, but without argument the proposition is submitted that in (a) where the executive entered into a treaty on behalf of Canada, Canada would be bound internationally even though the executive had abused its powers, whereas in (b) the executive may only bind the citizens of Canada in such matters as are or may be still done under the Crown's prerogative without the assistance of Parliament.

The other case, *re Aerial Navigation*, involved first a consideration of Canada's obligations under the "Convention relating to the Regulation of Aerial Navigation" of 1919, to which Canada was a party, and second, whether the Dominion or the Provinces had legislative control over aviation.

The following questions are raised by the facts and arguments in the Aerial Navigation case:

(a) In the event of a treaty being entered into by the Empire as a whole (to which Canada is a party), dealing with a subject assigned to the Provinces by the B.N.A. Act, which is the proper legislative body to implement it?

(b) Where Canada alone is a party to a treaty dealing with a similar subject ((a) *supra*), which is the proper legislative body to implement it?

(c) What is the situation with regard to agreements between Governments, including the Conventions of the International Labour Organization?

While it was generally admitted that the Dominion Parliament could legislate with regard to Empire treaties binding on Canada, it was argued that this power could only be exercised when the Provinces had failed to pass the required legislation. This argument was rejected by both the Supreme Court of Canada and later the Judicial Committee of the Privy Council, and there is now no doubt that the Dominion Parliament has the power to legislate in regard to matters, such as property and civil rights, which by Section 92, ss. (13), of the B.N.A. Act are assigned to the provinces when Canada is a party to a general Empire treaty dealing with the matter.

There was also a good deal of discussion as to whether the Dominion's power in this connexion was *exclusive* or merely *paramount*. Here the Privy Council went farther than the Supreme Court and held that the Dominion power was exclusive, but did not indicate whether, the executive having become a party to a treaty dealing with matters assigned to the Provinces by Section 93 of the B.N.A. Act, that fact in itself prevents the Provinces from legislating in regard to them.

Questions (b) and (c) are still uncertain, but it is submitted that if His Majesty on behalf of Canada enters into a treaty with another state the Dominion Parliament is the proper body to implement it, on the analogy that any treaty to which His Majesty is a party is an "Empire Treaty" as defined in Section 132 of the B.N.A. Act. On the other hand, in view of the practice of the Government with regard to the International Labour Conventions and the opinion of the Supreme Court in *re Treaty of Versailles*,¹ it is very doubtful whether the Dominion

¹ (1925), 3 D.L.R. 1114.

Government may enter into agreements with other Governments over matters which ordinarily belong to the Provincial sphere, or if, having done so, the Dominion Parliament may validly implement such agreements.

TERRITORIAL WATERS: JURISDICTION OVER PASSING VESSELS

§ 1

By the Treaty of Washington, 1848, it was stipulated in Article 1 that the boundary between the United States of America and British North America west of the Rocky Mountains should follow the 49th parallel of north latitude "to the middle of the channel which separates the continent from Vancouver's Island; and thence southerly through the middle of the said channel and Fuca's Strait to the Pacific Ocean; provided, however, that the navigation of the whole said channel and straits south of the 49th parallel of north latitude shall remain free and open to both parties".¹

"Disputes", says Hall, "involving the title to various islands having arisen, the boundary question at issue between the two nations was submitted to the arbitration of the German Emperor, and in 1873 a protocol was signed at Washington for the purpose of marking out the boundary in accordance with the arbitral decision. Under the protocol the boundary, after passing the islands which had given rise to the dispute, is carried across a space of water 35 miles long by 25 miles broad, and is then continued for 50 miles down the middle of a strait (Fuca's Strait) 15 miles broad until it touches the Pacific Ocean midway between Bonilla Point on Vancouver's Island and Tatoosh Island Lighthouse on the American shore, the water-way being $10\frac{1}{2}$ miles in width".²

This strait gives access from the Pacific to the ports of Vancouver, lying, as it were, at the angle between the Strait of Fuca proper and that of Georgia, which runs in a north-westerly direction between the eastern shore of Vancouver's Island and the State of Washington. To the south-west of the point of junction lies Puget Sound on which the American port of Seattle is situated.

The effect of the Treaty provisions referred to is that on the south (or American) side of the boundary line in the Strait of Fuca navigation is "open and free" to Great Britain. In other words, the right of innocent passage is assured to vessels on the British register; and by innocent passage (to quote a pronouncement of Mr. Bayard, Secretary of State, in 1896) is meant the right of foreign vessels to pass through territorial waters without molestation by the territorial sovereign, provided "they do not by loitering produce uneasiness on the shore or raise suspicion of smuggling".

§ 2

On March 20, 1930, the s.s. *Chief Capilano*, a British vessel registered in Hong-kong and owned by the Canadian American Company, Limited, was bound with a full cargo of timber from Vancouver, British Columbia, direct to Osaka, Japan. To gain the open sea the vessel used the international channel of the Strait of Fuca, i.e. proceeded down the Strait of Georgia, and, having rounded East Point in Canadian waters, set a course for Turn Point in American waters. After rounding Turn Point and while still in American waters, she was summoned to stop by a United States' Coast Guard vessel which fired three shots across her bow. On complying with this order, she was boarded by the Marshall of the

¹ See 8 Hertslet's *Treaties*, p. 930; and Molloy's *Treaties in Force*, Vol. I, p. 656.

² Hall, *International Law*, 8th ed., p. 195; cf. Parl. Papers 1873, No. 10, North America, and Molloy, *op. cit.*, Vol. I, p. 723.

United States' District Admiralty Court at Seattle and served with a writ *in rem* at the instance of an American Corporation resident in Portland, Oregon. She was thereafter towed to the port of Seattle, Washington, and there detained pending the determination of the court in a claim of damage against her owners, for loss of cargo shipped by the American corporation on the s.s. *Chief Maquilla*, a sister ship belonging to the same owners which had foundered in the North Pacific two years earlier, by reason, as was alleged, of unseaworthiness and bad stowage. The same claim made against the same owners in the Admiralty Court, Hongkong, had already been dismissed.

The master of the *Chief Capilano* appeared by counsel in the District Federal Admiralty Court, seeking release of the vessel from the attachment, on the ground that the seizure was unlawful as in violation of Article 1 of the Treaty and protocol above mentioned.

The Federal District Court of Admiralty at Seattle, without delivering a written opinion, made an order holding the seizure unlawful for the reasons set out by the master, and in so doing followed a decision of the Supreme Court of Canada in the case of *The ship "D. C. Whitney" v. St. Clair Navigation Company et al.*, (1907) 38 Canada Supreme Court Reports 303, turning on the application of a similar treaty stipulation for freedom of passage in Anglo-American boundary waters in Eastern Canada, contained in the Ashburton Treaty, 1865.¹

The intervention of the Circuit Court of Appeals for the 9th Circuit was unsuccessfully sought and the *Chief Capilano* was actually released. Thereafter it was urged that in seeking the release of the vessel her owners had actually entered a general appearance and submitted themselves to the jurisdiction of the District Court. This latter contention was denied by Judge Cushman a year after the original seizure.

§ 3

While the issue is satisfactory, the case itself is of interest as illustrating a type of case which, in the opinion of the Committee of Experts charged with preparing the Bases of Discussion for the diplomatic Conference on Codification of the International Law on Territorial Waters, was so unlikely to occur as not to call for detailed regulation.

Concerning Point XII, "*Limitation upon the Criminal and Civil Jurisdiction of the Coastal State*", the Committee's questionnaire was couched as follows:

- (1) Is the coastal state precluded from exercising jurisdiction: (a) in civil cases; (b) in criminal cases?
- (2) Is jurisdiction only exercisable in respect of occurrences happening during the passage?
- (3) Are these distinctions to be made according to whether the ship is passing through the territorial waters on its way to or from a port of the coastal state or is merely passing through such waters?
- (4) Are these distinctions to be made according to whether the effect of the occurrences does or does not extend beyond the ship itself or the persons on board or according to other criteria.
- (5) Arrest of a person on a ship passing through territorial waters.²

The reply of the United States Government,³ consisting exclusively of excerpts

¹ Cf. 6 Hertslet, *op. cit.*, p. 853.

² *League of Nations Publications*, C. 74, M. 39, 1929, V, p. 78.

³ *Ibid.*, pp. 128-54. Much more enlightening on the question in hand is the draft convention on Territorial Waters, prepared by the Research in International Law of the Harvard Law School (see 23 *American Journal of International Law*, Special

from judicial decisions or state papers, contains nothing specific on the question raised by the present case.

The reply of Great Britain¹ stated specifically:

"The State is not precluded from exercising jurisdiction (a) in civil, or (b) in criminal cases, over foreign merchant vessels or persons or property on board when passing through its territorial waters. Jurisdiction is not limited to occurrences happening during the same passage. It may be exercised to the same extent and subject to the same limitations as on the national territory."

After stating (a) that the rights which a state enjoys over its territorial waters are rights of sovereignty, and (b) that "rights of jurisdiction are, in practice, only exercised when it is necessary to do so in the interests of good government, but the state itself must be the judge whether or not the interests of good government require it", the reply answered in the negative point 3 mentioned above, but pointed out that in practice "a state would be much less disposed to exercise jurisdiction because of something which happened within its territorial waters if the vessel were not coming to or going from one of its ports than if it were doing so"; similarly, in regard to occurrences extending or not beyond the vessel itself or the persons on board. *In law* no distinction was to be made, "but, in fact and in practice, the distinction was of the first importance. . . . If the effect of the occurrences on board the foreign vessel extends beyond the vessel herself and those on board, the exigencies of good government are more likely to require that jurisdiction should be exercised".

In its observations on Basis of Discussion No. 24, the Committee of Experts alluded to the possibility of arrest of a passing vessel by the judicial authorities at the request of private persons interfering with the right of innocent passage.

Supplement, p. 297). Article 16, dealing with the exercise of civil jurisdiction, runs as follows: "A state may not exercise civil jurisdiction over a vessel of another state while it is in course of innocent passage through the marginal sea except in respect of an act committed by the vessel during the course of that innocent passage and not relating solely to the internal economy of the vessel."

The comment annexed by the Drafting Committee (Professor Grafton Wilson, chairman) reads: "This limitation (to acts committed by the vessel itself or by those on board during the innocent passage) clearly excludes the state's exercise of civil jurisdiction with reference to acts committed *before* the vessel entered the marginal seas on the particular voyage concerned. If, for instance, a British vessel had been in collision on the high seas or in French territorial waters, jurisdiction could not be taken by the United States with reference to that collision where the British vessel is in innocent passage through the American marginal sea.

"A vessel should not be subject to process nor should process be served on persons on board for any cause of action arising before the vessel entered the marginal sea, if the vessel is engaged in innocent passage.

"It must be recognized that this restriction may be applied somewhat narrowly. For instance, if a British vessel en route from Halifax to Havana should pass through the marginal sea of the United States off the Massachusetts coast, an act committed on the vessel while it is in this marginal sea should be subject to the civil jurisdiction of the United States; but if the vessel left the marginal seas and went on to the high sea, the United States could not exercise jurisdiction with respect to that act even though the vessel should later traverse the marginal sea of the United States in innocent passage off the Florida coast."

For these sensible observations no authority is cited. From which we may infer that cases involving the point in question have been rare in practice.

¹ *Ibid.*, pp. 162-6.

"A fear has been expressed", they say, "that the arrest within territorial waters of foreign ships by the judicial authorities at the request of private persons might interfere with the exercise of the right of innocent passage; but to this it is objected that in practice these difficulties scarcely ever happen. If, however, the Conference should think it desirable to restrict the possibility of such arrest, the following suggestion might be examined:

Basis of Discussion No. 24.

"When a foreign merchant ship is passing through territorial waters but is neither coming from nor bound for a port of the coastal state, the authorities of that state may not, in the exercise of the civil jurisdiction of the state, divert the ship from its course for the purpose of levying an execution or taking measures to preserve the rights of parties to any legal proceedings, except where such action is taken in consequence of events occurring in the waters of the state the effects of which extend beyond the ship itself."

The records of the Conference do not contain any reference to discussions concerning Basis of Discussion No. 24, which was referred to the sub-committee on March 27, 1930 (p. 96); amendments, however, were proposed.

France (p. 185) moved that the term "vessels other than vessels belonging to the naval forces" should be substituted in the Basis of Discussion for the term "merchant ships". Spain (p. 124) moved that Basis No. 24 be omitted. The United States amendment (p. 196) consists of a reservation. Great Britain (p. 186) moved an amendment which indicates a change of view when compared with its reply to the Expert Committee's questionnaire in C. 74, M. 39, 1929, V. It moved that the following be substituted for Basis of Discussion No. 24:

"A coastal state shall not stop or divert a foreign ship exercising the right of innocent passage for the purpose of civil jurisdiction against any person on the ship, and may not seize or arrest the ship in any civil proceedings other than proceedings taken in consequence of events occurring within the jurisdiction of the coastal state, provided that nothing in this article shall be deemed to authorize the seizure or arrest of any vessel which is owned by a foreign state."

As recast by the sub-committee, the British amendment now figures as Article 9 of the Thirteen Articles on the Legal Status of the Territorial Sea, forming Appendix 1 to the Report adopted by the Committee on April 10, 1930. It reads:

Article 9. A coastal state may not arrest nor divert a foreign vessel passing through the territorial sea, for the purpose of exercising civil jurisdiction, in relation to any person on board the vessel. A coastal state may not levy execution against, or arrest, the vessel for the purpose of any civil proceedings save only in respect of obligations or liabilities incurred by the vessel itself in the course of, or for the purpose of, its voyage through the waters of the coastal state.

The above provisions are without prejudice to the right of the coastal state in accordance with its law to levy execution against, or to arrest, a foreign vessel in the inland waters of the state or lying in the territorial sea, or passing through the territorial sea after leaving the inland waters of the state, for the purpose of any civil proceedings.

The Committee observations add:

"The rules adopted for criminal jurisdiction have been closely followed. A vessel which is only navigating the territorial sea without touching the inland waters of the coastal state may in no circumstances be stopped for the purpose of exercising civil jurisdiction in relation to any person on board or for levying execution against or for arresting the vessel itself, except as a result of events occurring in the waters of the coastal state during the voyage in question, as for example, a collision, salvage, &c., or in respect of obligations incurred for the purpose of the voyage.

A. H. CHARTERIS.

AMERICAN ARBITRATION AGREEMENTS

United States-Panama Claims Commission. By a convention signed at Washington, July 28, 1926, and ratified by the parties in September 1931, all claims of the citizens of either country against the other, arising since November 3, 1903, with certain exceptions, are to be submitted to an arbitral commission of three persons: one member appointed by each Government, and the other, who shall serve as umpire, by mutual agreement between the two Governments. In the event of failure to agree on the third commissioner, he is to be chosen by the President of the Administrative Council of the Permanent Court of Arbitration at The Hague. The claims of the United States are, for the most part, for damages on account of personal injuries, the taking of property, detention of vessels, illegal tax assessments, and illegal arrests and imprisonments. The great majority of them are for injuries growing out of riots at Panama City and Colon in 1915, in which 52 American soldiers were injured. The Commission is required to base its award on "principles of international law, justice, and equity". It is expressly stated, however, that "no claim shall be disallowed or rejected by the Commission through the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim". The waiver of this condition is made for the purpose of assuring claimants an equitable, just, and adequate compensation for the losses and damage sustained by them. It will be recalled that a similar waiver was inserted in the Anglo-American Claims Convention of August 18, 1910, and in the American-Mexican Claims Convention of September 8, 1923.

United States-Swedish Arbitration. By another convention signed at Washington on December 17, 1930, between the United States and Sweden, certain claims of the Government of Sweden in behalf of a Swedish Corporation, growing out of the alleged detention in American ports of the motor-ships *Kronprins Gustaf Adolf* and *Pacific*, are to be submitted to arbitration pursuant to the Hague Convention of 1907 for the Pacific Settlement of International Disputes. The United States first denies that the vessels were in fact detained, and second, says that in case the decision is against it on the first point, it is not liable for the payment of an indemnity. Both questions, including also the determination of the amount of the indemnity to be paid by the United States in the event of an adverse decision on these questions, are to be submitted to a sole arbitrator who shall not be a national of either country. In case the two Governments are unable to agree on the choice of the arbitrator, they will proceed to the establishment of a tribunal of three members: one appointed by each Government, and the third, who shall serve as umpire, shall be chosen by mutual agreement of the two Governments. No member of the tribunal may be a national of either country. The proceedings in the case are to be conducted in the English language.

JAMES W. GARNER.

THE TREATY OF INTER-AMERICAN ARBITRATION OF 1929

The Senate's Reservations.

THE general treaty of inter-American Arbitration, signed at Washington on January 5, 1929, by plenipotentiaries of all the American States except Argentina (and, of course, Canada, which is not a member of the Pan-American Union), was ratified by the Senate of the United States on January 19, 1932, three years

after its conclusion. The treaty had in the meantime been ratified by Chile, Cuba, the Dominican Republic, El Salvador, Guatemala, Mexico, Panama, and Peru. The scope and terms of the treaty were explained by Sir John Fischer Williams in an article in this *Year Book* for 1929 (pp. 14 ff.). It is perhaps the most comprehensive general arbitration treaty that has yet been concluded, since it excepts from the obligation to arbitrate only international disputes which are not juridical in their nature and those which "affect the interest or refer to the action of a state not a party to the treaty". The purpose of this latter exception, the authorship of which has been attributed to Mr. Charles E. Hughes, was, according to Dr. James Brown Scott, a delegate to the Pan-American Conference which proposed the treaty, to exclude disputes involving the Monroe Doctrine.¹ It will be remembered that the Kellogg bilateral treaties of arbitration of 1928 between the United States and some twenty or more non-American states, in express terms excluded from the obligation to arbitrate all disputes the subject matter of which "depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine". Logically there could be no place in the Inter-American Arbitration Treaty for such an exception, since disputes involving the Monroe Doctrine, if it were interpreted as a policy of national defence for the United States against the action of non-American states only, could not arise between the parties to this treaty since they are all American states. Nevertheless, the United States representatives appear to have conceived the possibility of disputes between two or more American states, parties to the treaty, which might in some way involve the Monroe Doctrine, and since the United States claims the right to decide for itself all such disputes, they must be excluded from arbitration. But in view of the increasing opposition in Latin-America to the Monroe Doctrine as now interpreted, an express reservation, which would have relieved the United States from an obligation to arbitrate disputes with the Latin-American states involving the Monroe Doctrine, would probably have led some of them to reject the Treaty. Accordingly, the clause mentioned above was devised, which Dr. Scott says "skilfully and impliedly exempts the Monroe Doctrine without mentioning the name".

The Senate of the United States, in giving its advice and consent to the ratification of the Treaty, made two important reservations. The first relates to the *compromis*, which by the terms of the treaty is to be made by the parties without any reference to the necessity of ratification by a legislative body or either chamber thereof. In case the parties fail to agree upon the terms of the *compromis* within three months from the date of the installation of the court or tribunal, the latter shall formulate the *compromis*. In accordance with its position in regard to the Roosevelt-Hay Treaties and others since concluded, the Senate took exception to this provision which eliminated it from a share in the conclusion of the *compromis*. It accordingly attached to its ratification a reservation to the effect that any *compromis* to which the United States should be a party can be made only by the President and then only by and with its advice and consent.

¹ But Mr. Hughes, in discussing the exception at the Conference gave the following explanation: "But if a third state has an interest in the controversy, or if the action of a third state is to be the subject of discussion, it is manifest that there ought not to be an arbitration which draws in that interest or action, even though its award might not be binding upon the third state." (*Proceedings of the International Conference of American States on Conciliation and Arbitration at Washington, 1928-9*, p. 604.

This reservation would, of course, prevent the court itself from formulating the *compromis*. The result is that no dispute between the United States and any other party can be arbitrated under this treaty without the consent of the Senate, two-thirds of its members concurring. The attitude of the Senate puts the United States in a position respecting arbitration different from that of nearly all other nations. It is said that of sixty arbitration treaties registered with the Secretariat of the League of Nations down to 1927, only two required the *compromis* to be approved by the legislative body, and both of these were treaties to which the United States was a party.¹ It is also stated that of thirty-six bilateral arbitration treaties which have been concluded among Latin-American states themselves, only those to which Brazil is a party provide for the submission of the *compromis* to the legislature for its approval. Both Presidents Roosevelt and Taft pronounced arbitration treaties with such provisions as "shams", and Mr. Charles E. Hughes, one of the signers of the Inter-American Arbitration Treaty, has stated that, had such a proposal been made at the Conference which concluded the treaty, it would have been fatal and would have been regarded as an attempt to provide for obligatory arbitration in form while rejecting it in fact.²

The second reservation of the Senate excludes from the obligation to arbitrate three classes of disputes: first, pending questions or controversies; second, those which may arise in the future relative to acts done prior to the date on which the treaty goes into effect; and third, those arising "under treaties" concluded prior to the same date. It was doubtless the intention of the Senate to relieve the United States of the obligation to arbitrate disputes arising out of certain acts done by it in Latin-America in connexion with its interventions therein, and perhaps also disputes which might arise out of treaties containing such provisions as the Platt amendment, which the United States in effect insists on interpreting itself. Whatever may be said of the merits of such exceptions, the exclusion of disputes arising out of the interpretation of all treaties heretofore concluded by the United States with Latin-American countries, and which are still in force, is hardly consistent with the purpose of Article 1 of the present treaty, which expressly enumerates among the questions of a juridical character which the parties agree to arbitrate, "controversies regarding the interpretation of a treaty". The effect of the reservation will be to exclude from arbitration probably the largest category of disputes likely to arise between the United States and the other parties, since, as Senator LaFollette, who protested against the reservation, pointed out, there are now in force between the United States and the various Latin-American states more than one hundred treaties. Under the Senate reservation there is apparently no obligation on the part of the United States to arbitrate any dispute arising under or out of the interpretation of any one of these treaties. "To my mind", said Senator LaFollette, in criticizing the reservation, "it really makes this treaty an idle gesture, because it will confine its operations entirely to fresh controversies which may arise in the future".³ In defence of the reservation, Senator Borah asserted that eight of the Latin-American states signatories of the treaty had made the same reservation. An examination of their reservations, however, seems to show that Senator Borah's assertion is incorrect. It is true that several of them made reservations at the time of signature which

¹ Murdock, *American Journal of International Law*, Vol. XXIII (1929), p. 285, and Whitton, *ibid.*, Vol. XXV (1931), p. 468. ² Article in the *Yale Review*, 1929, p. 657.

³ *Congressional Record*, January 19, 1932, p. 2307.

were intended to except disputes arising out of *acts* antedating the signature of the present treaty, but apparently only one (Bolivia), and there is doubt even as to this one, went to the length of the United States reservation of excluding disputes arising under treaties concluded prior to the date of going into effect of the present treaty. It is not easy to reconcile the reservation of the Senate, if it means what it seems to mean, with the spirit of the solemn declaration contained in the preamble concerning the acceptance by the American republics of the principle of obligatory arbitration for the settlement of international differences.¹

JAMES W. GARNER.

PALESTINIAN CITIZENSHIP

PALESTINIAN nationality, or citizenship, as it was called, was defined in an Order in Council of 1925, of which the main provisions are summarized in an article in the *Year Book* for 1926. It was pointed out in that article that, by a curious oversight, the date fixed for determining the acquisition of the new citizenship by the inhabitants of Palestine, who had hitherto been Ottoman subjects, was August 1, 1925, which was the date of the Order in Council, and not the date at which the Treaty of Lausanne came into force, viz. August 6, 1924. Yet, by the provisions of the Treaty, persons habitually resident in the territories detached from Turkey (i.e. Palestine, Syria, Iraq) were to become nationals of the mandated states in the conditions laid down by the local law, as soon as the Treaty came into operation. Emigration from Palestine to Northern, Central, and Southern America is constant; and so a class of those who left Palestine between August 1924 and August 1925 became stateless. They lost their Ottoman nationality under the Treaty, and they did not acquire Palestinian citizenship under the Order in Council. It is true that they were entitled by a clause of the Order to opt for Palestinian citizenship while abroad; but the conditions of option were birth in Palestine and a declaration made within two years of the date of the Order, as well as intention to reside permanently in Palestine. The first condition deprived a certain number, the second more, partly on account of the delay in publishing notice of the law in the remoter countries and bringing it to the knowledge of the stray families affected, and partly on account of Oriental inertia. The applications were often made too late to be valid. The position is now improved by an amending Order in Council of July 23, 1931; and the anomaly of the discrepancy between the date in the Treaty and the date in the Order is removed. The amendment declares that Turkish subjects who were habitually resident in Palestine on August 6, 1924, but ceased to be so resident before August 1, 1925, shall be deemed to have become Palestinian citizens unless before the date of the Order they have voluntarily acquired another nationality.

It is a constant grievance of the Arabs of Palestine that thousands of men of Palestinian origin resident in America are denied the citizenship of their country and compelled to keep an Ottoman nationality which is unreal and deprives them of any effective protection abroad. So far as such persons emigrated before the date of the Treaty of Lausanne, and have not satisfied the conditions of option, they are still without remedy; but some alleviation of the grievance will be given by the admission to citizenship of those who emigrated between August 1924 and

¹ It may be remarked that the delegates of the United States signed the treaty without any reservations, and Mr. Hughes pronounced it to be "a notable advance in the development of peaceable settlement". (*Proceedings of the Conference*, p. 610.)

August 1925. It is a pity, in a way, that a more drastic amendment of the original Order could not be entertained, so as to invest with Palestinian citizenship all persons of Palestinian origin resident abroad who have not acquired any other national status and would opt for the citizenship. That course would doubtless have thrown a burden of British protection on our diplomatic and consular officers on behalf of a number of natives of Palestine who live abroad for an indefinite period; but it would have removed a misunderstanding from the minds of a simple people who are perplexed by the subtlety that, while Palestine is under the rule of a mandatory, persons of Palestinian origin should be left to the empty protection of the Turks.

The amending Order preserves the right of any person affected by the extension of the principle imposing Palestinian citizenship to opt for Turkish nationality; and gives him a period of four years from the date of the Order to make application. The original Citizenship Order prescribed a period of two years for such option, and presumably it is felt that the fullest opportunity should be given to maintain the old Ottoman subjection, though the number of persons of Palestinian origin who desire it, under the condition of leaving Palestine and taking up residence in Turkey, must be very small.

The Order amends also certain provisions of the original instrument with regard to the revocation of citizenship and the status of married women. The principal Order follows the British Nationality Act in providing for the revocation of naturalization if, among other conditions, the person to whom it was granted is ordinarily resident out of Palestine for more than three years. The amendment adds the condition "and has not maintained substantial connexion with Palestine". In practice, that will not make much change since the old law has been applied with that qualification; but it will make the legal position clearer. A number of Jews who have come to Palestine and obtained naturalization, for one reason or another return to their country of origin or emigrate and seek a livelihood elsewhere for a time. Provided that they keep some genuine connexion, which must not be simply a sentimental attachment, with the country, they will not sacrifice their new citizenship by absence for three years. On the other hand, the power of revoking citizenship is extended to cover the cases of persons who have acquired it not by naturalization but by option in the special circumstances prescribed for those who, not of Ottoman nationality, were habitually resident in Palestine in 1925, and for those of Palestinian origin who were resident abroad in the same year.

With regard to married women, the original Order provided that a revocation made against the husband should not extend to the wife if she had been at birth a Palestinian citizen, unless the High Commissioner was satisfied that, if she had held a certificate of naturalization in her own right, the certificate could have properly been revoked. It was overlooked that, for some years, the married woman of Palestine could not possibly have had Palestinian citizenship at birth, since that status was only granted to a person born after August 1925. It was presumably the intention to make the concession to a woman who was essentially Palestinian and who acquired that citizenship originally. This intention is now carried out by a clause which allows a woman who acquired citizenship before marriage in her own right to keep that citizenship notwithstanding the revocation of her husband's naturalization or acquisition, unless she herself has given some cause for the revocation.

SHANGHAI

THE recent events in the Far East, almost culminating in a state of war between China and Japan, must not overshadow the striking Report of the Hon. Mr. Justice Feetham, addressed to the Shanghai Municipal Council last year. To any one with knowledge of Shanghai and its past and interested in its future this Report will well repay study, quite apart from the general international questions involved.

"Shanghai" in its largest sense now comprises the International Settlement, the French Concession, and the Chinese Municipality of Greater Shanghai; but it was the Municipal Council, the Governing Body of the International Settlement, that, faced with acute problems of reform, unanimously asked the Government of the Union of South Africa for the loan of the services of the learned Judge to advise it, as being a man free from previous commitment or bias and combining judicial with municipal and political experience. As a result, Mr. Justice Feetham arrived in Shanghai in January 1930 to undertake the task, and the first part of his Report was published in April 1931, the remainder following shortly afterwards.

This Report, in considering the past history of the Settlement, lays stress upon two factors not always kept in the foreground, but of great importance: (1) the very foundation of the International Settlement is a treaty, made between China and foreign Powers, known as "the Treaty Powers"; and (2) the Municipal Council itself, withdrawn from the jurisdiction of any of the local courts, is in reality an extraterritorial body.

Nowadays the Settlement has very different boundaries from those existing at its inception, great extensions having been made; and the Council exercises its powers over foreigners who retain extraterritorial rights, over others who no longer enjoy them, and over very large numbers of Chinese. The wealth and commercial importance of Shanghai, both as a port and as an industrial centre, have grown vastly, due in great measure to the security afforded by adequate protection of persons and property and by the rule of law. These matters all add to the difficulty of the questions under consideration; it is to be remembered that any constructive scheme for the future was to give "full consideration" to the aspirations of the Chinese people (e.g. rendition of the Settlement and the abolition of extraterritoriality) and at the same time to safeguard the economic interests represented in the commercial and business development of Shanghai. Considerable advances towards reform have been made in recent times: Chinese courts now function in the Settlement; Chinese representatives sit on the Council and its committees; due publicity is given, both in the Chinese and English languages, to the proceedings of the Council; the employment of Chinese in the higher ranks of the Council's employees is foreshadowed. But taking all these things into account and comparing the results of the Settlement régime with those of Chinese municipalities and noting the underlying causes which help to account for the differences, the learned Judge fails to find hope for any immediate prospect of the end to some period of tutelage, longer rather than shorter, before the Chinese can be ready to take their full share in any scheme of municipal government for an area of the nature of Shanghai.

For the ultimate future, the Report envisages, as the natural solution of the problem of municipal government, the formation of a municipal body by the National Government of China, to be elected by Chinese and foreigners, and

functioning over some well-defined area with adequate powers to be laid down in its charter of foundation. The area would have to be the subject of agreement with the Powers concerned. But this does not appear possible in the near future, though steps might be taken now to remedy defects which have become apparent in the present Constitution (e.g. the limitation on powers of legislation). It is not very likely that recent events in the earlier months of 1932 have made the position at Shanghai any nearer solution. Japan is one of the Treaty Powers and has a large number of her nationals living and carrying on business in the Settlement. Will she now be more ready to consider the question of rendition and Chinese aspirations? And China—after knowing the use made of the Settlement by Japan's soldiers and sailors, how will she face the issue?

The whole question, considered from every aspect, is full of difficulty, made no easier by recent events. The variety and complexity of the matters found necessary to be discussed in the Report show its importance both for China and for the foreign Governments interested so deeply in the future of the Settlement. The present Report, the result of an exhaustive and independent inquiry into the whole problem of the municipal government of Shanghai, should be welcomed by all.

USE OF LANGUAGES OTHER THAN ENGLISH OR FRENCH IN CONVENTIONS CONCLUDED AT CONFERENCES CONVENED BY THE LEAGUE OF NATIONS

An interesting innovation was made at the Conference for the Unification of River Law held at Geneva in December 1930. Conventions concluded at conferences convened by the League of Nations are normally drawn up in French and English, both texts being equally authoritative. The River Law Conference was, however, limited to European States, and the United Kingdom and the Irish Free State were not represented. In these circumstances the proceedings were conducted entirely in French and the three Conventions adopted, dealing respectively with unification of certain legal rules regarding collisions, matriculation of inland navigation vessels, real rights in such vessels and connected questions, and administrative measures evidencing the right of such vessels to their flag, were drawn up in French. In view of the object of the Conference, which was to effect a unification of legal rules on the rivers of the continent of Europe, and the extreme difficulty of rendering accurately in English terms which correspond to legal conceptions differing widely from those of English law,¹ the existence of an authoritative English text would no doubt have served no useful purpose and might have increased the difficulty of interpreting the Convention. A proposal was, however, made by the German Delegation for the drafting of the Convention in German.

The question of drafting authoritative texts of international conventions in several languages is a difficult one, because it excites feelings of national prestige. The question can, however, not be solved on this basis. At least five languages would have a claim for consideration. It is hardly conceivable that any conference should be able to discuss and satisfy itself of the exact concordance of complicated

¹ It is doubtless for similar reasons that though the Convention of May 21, 1931, for the creation of an International Agricultural Mortgage Credit Company is drawn up both in French and in English, the French text is to prevail in the event of divergence between the two texts. (Art. 13.)

texts drawn up in so many different languages.¹ The use by the League of French and English concurrently is a matter of practical expediency. The proposal of the German Delegation was, however, put forward, and was supported by other delegations, for technical reasons connected with the nature of the Conventions themselves and the importance of the German rivers and German language in river navigation in Europe. After some discussion, which will be found in the minutes of the Conference, pp. 49-55, 60, and 64, the desiderata of the advocates of a German text were met by inserting in the Protocols which are annexed to the three Conventions the following provision:

"Il est joint à la présente Convention un texte en langue allemande; les Plénipotentiaires, en signant ladite Convention, peuvent réserver à leur Gouvernement le droit, en la ratifiant, d'adopter ce texte, étant entendu que, dans ce cas, ledit texte vaudra également dans les rapports entre les États qui auraient usé du même droit et qu'au cas de différend entre ces États sur l'interprétation des textes, le texte de la Convention prévaudra si un des États parties ou intervenant au différend le réclame.

"Le même droit est reconnu aux États qui adhéreront à la Convention."

The German texts in question were made under the authority of the Conference by a special committee appointed for the purpose.

K.

PERMANENT COURT OF INTERNATIONAL JUSTICE—THE REVISION PROTOCOL

In the early part of the present year the Cuban Government withdrew the reservations they had made in giving their ratification of the Protocol for the Revision of the Statute of the Permanent Court of International Justice. So long as those reservations stood, any practical possibility of the Protocol coming into force was excluded, inasmuch as one reservation related to the most important of the proposed changes, namely, that concerning the continuous session of the Court and the duty of the judges to be permanently at its disposal. It was obvious that the other parties to the Protocol would never have accepted this reservation, and without their acceptance Cuba's adhesion was ineffective. In fact, a number of Governments had already stated in terms that they were unable to accept the reservation in question.

The matter was raised at the Assembly of the League in 1931. As a result of the discussion, the Cuban Government intimated that they were disposed to ask their Senate to withdraw the reservations, and a resolution referring to the subject was passed, one point of which is of interest in that it reaffirms the rule of international law that a "reservation can only be made at the moment of ratification if all the other signatory states agree or if such reservation has been provided for in the text of the Convention".

It will be remembered that the Revision Protocol contained a special and peculiar clause as to the date of its coming into force, to the effect that this should take place on September 1, 1930, provided the Council was satisfied that none of the parties to the original Protocol of Signature of the Statute objected to the Revision Protocol. As is well known, the attempt to bring the Revision Protocol into operation under this provision in time for the election of the judges in September 1930 failed, so that the instrument can only come into force in the ordinary manner—by ratification of all the states parties to the original Statute.

¹ The Reparations (Young) Plan of 1929 was drawn up in four texts, English, French, German, and Italian, of equal authority. J.F.W.

The states which have signed and ratified the Protocol of Signature of December 16, 1920, accepting the original Statute, number forty-six. Of these, thirty-nine have now signed and ratified the Revision Protocol, six have signed but not ratified, and one, Ethiopia, has neither signed nor ratified.

Article 7 of the Revision Protocol states that the United States shall be in the same position as a state having ratified the Protocol of December 16, 1920, and it might be argued that this makes the ratification of that country necessary before the Revision Protocol can come into force. But it has been publicly declared by the American Government that they would have no objection to the revised Statute coming into force as between states ratifying the Revision Protocol, and there is no reason of substance why American ratification should be required; it seems therefore safe to say that the Revision Protocol will become operative when the seven outstanding ratifications mentioned above have been deposited. There is no known reason why these ratifications should be withheld, and thus it now seems probable that the revised Statute will come into effect before long—say in the course of next year.

A. P. F.

L'INSTITUT DE DROIT INTERNATIONAL

L'INSTITUT de Droit International held its 37th session at Cambridge from July 28 to August 4, 1931. There was a large attendance of members and associates, 64 in all, representing 21 different nationalities. The number would have been even larger but for the fact that the Permanent Court of International Justice, the majority of the members of which are also members or associates of the Institut, was in session at the time.

The only previous occasion on which the Institut met in Cambridge was in 1895, when Professor John Westlake presided. At the session last year the President was Professor A. Pearce Higgins, the present occupant of the Whewell Chair of International Law in the University. The three Vice-Presidents were Professor A. Nerinx of the University of Louvain, Professor Audinet of the University of Poitiers, and Professor Philip Marshall of the University of Princeton; they shared with the President the duty of presiding over the discussions.

The British members and associates present were Sir Thomas Barclay, Professor J. L. Brierly, and Sir John Fischer Williams; Dr. Arnold D. McNair, who was elected an associate at the administrative meeting, also took part in the meetings.

On the first day of the session the Vice-Chancellor of the University (the Master of Magdalene College) conferred the Honorary Degree of LL.D. on Messrs. Enrico Catellani, Professor of the University of Padua, James Brown Scott, Secretary-General of the Carnegie Foundation for International Peace, and Nicolas Politis, Honorary Professor in the Faculty of Law of Paris and Minister of Greece to the Government of the French Republic. The University had also offered honorary degrees to Baron Albéric Rolin, MM. Charles Lyon-Caen, K. H. L. Hammarskjöld, and W. Schücking, but they were unfortunately unable to attend.

At the opening session in the Senate House, the Vice-Chancellor, in the name of the University, welcomed the Institut, and subsequently the Mayor of Cambridge (Mr. E. Jackson) received the members at the Guildhall and welcomed them in the name of the town of Cambridge. Hospitality was accorded by Gonville and Caius, St. John's and Trinity Colleges, and the President and Mrs.

Pearce Higgins entertained the members and friends at a Garden Party in the Fellows' Garden of Downing College. The Master and Fellows of Emmanuel College placed the beautiful old Library of the College at the disposal of the Institut, and its meetings were held there.

The meetings of the Institut are serious gatherings for work, and on most days at least six hours were spent in discussing the various reports which figured on the *ordre du jour*. Four topics were finally dealt with, and the result of the discussions embodied in a series of resolutions; they were the following: (1) International mandates (Rapporteur M. Henri Rolin), (2) Conflict of laws in the matter of status and capacity (Rapporteur M. J. P. Niboyet), (3) Conflict of penal laws in the matter of competence (Rapporteur M. A. Mercier), (4) Conflict of laws relative to domicile (Rapporteur M. E. Mahaim). Considerable time was devoted to a first reading of a project for the Régime of International Rivers and Waterways, prepared by M. Vallotton d'Erlach. In addition to these topics an interesting communication was made by M. André Mandelstam on the Protection of Minorities. An exchange of views took place on a Rapport by M. Louis le Fur on the recognition, determination, and signification in international law of the domain left by the latter to the exclusive competence of a state, and also on a Rapport by Professors E. Borchard and Kraus, on the diplomatic protection of foreigners abroad.

At the session in New York in 1929, Dr. James Brown Scott had introduced the project of founding a prize to commemorate the names of various distinguished jurists, which should be awarded periodically to the best essay. The Secretary-General of the Institut (Professor Charles de Visscher) and Professor G. Gidel were requested to prepare a draft scheme to carry out the idea, and this was presented and approved at the meeting in Cambridge. The names of the jurists thus proposed to be commemorated are Calvo, Grotius, Lieber, F. de Martens, Mancini, Pufendorf, Renault, Gustave Rolin-Jacquemyns, Vitoria, and Westlake. The first award is to be associated with the name of John Westlake in commemoration of the Cambridge meeting. The amount of the prize, which is to be awarded every two years, is \$400. Dr. James Brown Scott announced that he desired to provide the necessary endowment for the prizes in commemoration of his mother. This generous offer was gratefully accepted.

The next session has been fixed to be held at Oslo in August 1932 under the presidency of M. Beichmann; Dr. Max Huber was elected First Vice-President, and MM. Audinet and Philip Marshall Brown retain their offices as Second and Third Vice-Presidents.

A. P. H.

THE GROTIUS SOCIETY

THE following papers were read before this Society during the year 1931, and, with the exception of the first, will appear in Volume XVII of the *Transactions* of the Society:

1. "The First Conference for the Codification of International Law", by Señor Alejandro Alvarez. (Printed in Volume XVI of the *Transactions*.)
2. "Recent Insurance Legislation", by Mr. A. O. Pickering, of the London Assurance.
3. "The Problem of Nationalities", by Robert Redslob, Professor of International Law and Diplomatic History at the University of Strasbourg.
4. "India's International Status", by Dr. Lanka Sundaram.

5. "The Iraq Treaty, 1931", by S. G. Vesey-Fitzgerald.
6. "The Problem of Sanctions", by Professor J. L. Brierly.
7. "The Judicial Policy for the Settlement of International Disputes", by M. Caloyanni (some time *ad hoc* judge nominated by the Greek Government at the Permanent Court of International Justice).
8. "Some International Aspects of Divorce and Nullity", by W. Latey.
9. "The Economic Weapon as a means of Peaceful Pressure", by Sir Anton Bertram, formerly Chief Justice of Ceylon.
10. "Diplomatic Claims in respect of Injuries to Companies", by W. E. Beckett.

W. A. B.

THE HAGUE ACADEMY OF INTERNATIONAL LAW

THE lectures at The Hague Academy of International Law, which was established in 1923, have hitherto been given exclusively in the French language. A request has recently been addressed to the Curatorium of the Academy by a body of American professors who have lectured there, asking that the English language should be placed on a footing of equality with the French; in this application they were supported by their English colleagues. The reasons advanced in support of this application were based on the fact that the two languages have been placed on a footing of equality in the League of Nations and the Permanent Court of International Justice; that a strict adherence to the present practice tends to debar a number of English and American professors, otherwise well-qualified, from co-operating in the work of the Academy. It was also urged that such a change would be acceptable to the students from many countries, whose knowledge of English is better than their knowledge of French.

When the question was before the Curatorium, similar claims were advanced on behalf of the German, Italian, and Spanish languages. This important matter was considered at two separate meetings of the Curatorium, which is naturally most anxious to increase the usefulness of this institution. It was decided that the principle laid down in the *Règlement* of the Curatorium, making French the ordinary language of instruction, must be maintained, and that the lectures must continue to be published in that language. There is, however, a provision in Article XII of the *Règlement*, with which professors appear to be unacquainted, which enables the Curatorium, in exceptional cases, on the request of a professor, to allow him to give his lectures in his own language. The Bureau of the Curatorium is, therefore, prepared to consider any such application on its merits, and, if it appears that the best interests of the Academy will be served by complying with such request, will give the necessary permission. But professors who are allowed to give their lectures in any language other than French must undertake to furnish a translation into that language for publication in the *Recueil des Cours*.

As an experiment, this opportunity of allowing students to hear lectures by professors in their own language is well worth a trial. It is not expected that there will be many applications to the Bureau for the permission to give such lectures.

The attendance of students at the Academy continues to be satisfactory; last year 400 students, representing 34 different nationalities, were enrolled; the number of English students is still very small, and it is desirable that it should be increased.

A. PEARCE HIGGINS.

GENERAL CONVENTIONS PREPARED AT GENEVA IN 1931

LEAGUE OF NATIONS

I

UNIFICATION OF LAWS ON BILLS OF EXCHANGE, PROMISSORY NOTES AND
CHEQUES; CHEQUES.

THESE instruments, three in number, were drawn up by a Conference sitting at Geneva from February 23 to March 19, 1931, and bear the date March 19. They are the culmination of a long series of efforts, recommendations on the subject having been adopted as long ago as 1912, at the second Hague Conference. The League experts who prepared the drafts have received much help from the International Chamber of Commerce. The kindred subject of bills of exchange was regulated at a previous Conference. The instruments comprise a Convention providing for a uniform law for cheques, and protocol; a Convention for the settlement of certain conflicts of views in connexion with cheques, and protocol; and a Convention on the stamp laws in connexion with cheques, and protocol. As regards methods, the principles adopted with regard to the Conventions on bills of exchange, described in the last issue of this *Year Book*, were retained. The Conventions bind the signatories to introduce the uniform law, and provide a time-limit for denunciation. Thus national legislative authorities are able to uphold their right to modify an internal law whenever necessary. Certain cases of emergency are reserved, i.e. are left to the discretion of the Parties.

II

ROAD TRAFFIC.

These instruments, three in number, bear the date March 30, 1931, and were concluded by the European Road Traffic Conference which sat at Geneva from March 16 to 30. The Convention concerning the Unification of Road Signals has as its object the national and international unification of the signs employed for regulating motor traffic. The Conference reduced the number of these signs to the minimum compatible with efficiency, and also indicated the inscriptions or signs on the signals themselves. It also adopted certain new signals. The Convention enters into force six months after the deposit of the fifth ratification or accession. The Convention on the taxation of foreign motor vehicles, with protocol annexe, aims at the exemption of private touring cars from the taxes or charges levied on the circulation or possession of motor vehicles in the country visited, or in any part of it. The duration of the exemption is fixed at ninety days, which may be made up of one or several stays. The Convention provides for the establishment of a fiscal permit for one year, issued either by the competent authority of the country of registration, or by a body authorized by it. The Convention enters into force six months after the deposit of the fifth ratification or accession. The Agreement between customs authorities in order to facilitate the procedure in the case of undischarged or lost triptychs, which entered into force ninety days after its signature on behalf of three customs administrations, i.e. on June 26, 1931, provides that in all cases where the production of a consular certificate for the purpose of verifying a triptych or a customs carnet is permitted, the party concerned may furnish a certificate from the customs authority of another country, containing all particulars of identity entered in the triptych or carnet, stating that the vehicle is within that country.

III

AGRICULTURAL CREDITS.

The Convention for the creation of an International Agricultural Mortgage Credit Company, with Charter and Statutes, was concluded on May 21, 1931. It provides for and fixes the statutes of a company for making long or medium-term loans with amortization to mortgage credit companies, which lend the sums so received on first mortgage of immovable agricultural property. The Company is also empowered to create and negotiate bonds for that purpose. Contracting Parties agree to contribute, on a scale fixed with reference to their contributions to the League of Nations, to a special reserve of the company, as security for its commitments; and the Convention comes into force when the contributions due to this reserve from Governments ratifying the Convention reach the figure of 25,000,000 gold francs.

IV

TRAFFIC IN OPIUM AND OTHER DANGEROUS DRUGS.

A Convention for limiting the manufacture and regulating the distribution of narcotic drugs was concluded on July 13, 1931, after a prolonged and stormy Conference. Its provisions may be summarized as follows:

Each Contracting Party undertakes to furnish the Permanent Central Opium Board, established under the Convention of 1925, with reasoned annual estimates of the medical and scientific requirements for each of their territories of each drug. These estimates, which are considered by a Central Supervisory Body, form a basis on which a world drug manufacture total will be established. The Supervisory Body can ask for further information or details, except as regards government requirements. No country may manufacture in any one year more of any drug than was given in the estimate for conversion, internal consumption, export and the constitution of government and reserve stocks (to which no limits are set), minus any amounts imported or utilized for conversion. The Permanent Central Board prepares an annual statement showing the estimates for each territory of each drug consumed, manufactured, converted, imported, or exported; if this shows that a contracting party has failed to carry out its obligations, explanations can be required. Each country agrees also to apply all the provisions of the 1925 Convention, and provisions are added which complete and greatly strengthen that Convention; the drugs covered by the Convention now comprise all heroin and possible derivatives of opium and the coca-leaf, and new products derived from these two substances cannot be put on the market except under certain limited conditions. Every country creates a special administration to apply the Convention, regulate, supervise, and control the drug trade and organize the campaign against addiction. Manufacturers must report quarterly to their national authority on the drugs manufactured by them or in stock. Any drugs seized in illicit traffic are to be destroyed, converted into non-narcotic substances, or appropriated for medical or scientific use. Contracting parties report annually on the working of the Convention and on important cases of illicit traffic.

The Convention comes into force when ratified by twenty-five states, including four of the following: France, Great Britain, Germany, Japan, the Netherlands, Switzerland, Turkey, the U.S.A.

V

CONVENTION FOR THE REGULATION OF WHALING.

This Convention bears the date September 24, 1931. Its object is to prevent the destruction of the world supply of whales through unlimited competition in fishing. It applies to all seas in the world, both high seas and territorial waters. Contracting Parties themselves take the appropriate measures to ensure the application of the Convention and the punishment of infractions. The Convention applies to whalebone whales, but not to toothed whales. It absolutely forbids the taking or killing of certain rare species, of calves or miniature whales, and of females accompanied by sucklings. It provides for the fullest possible use of the animals killed, and for licences for whalers. Its entry into force is subject to the ratification or accession of eight countries including Norway and Great Britain.

VI

GENERAL CONVENTION TO IMPROVE THE MEANS OF PREVENTING WAR.

This Convention, concluded on September 26, 1931, after nearly four years' labour, constitutes an attempt to strengthen the Council of the League in dealing with disputes brought before it under Article XI of the Covenant by removing its two main weaknesses: the fact that Article XI at present lays no obligation on parties to a dispute to accept the Council's advice, and that the "unanimity rule" requires their consent for the Council to pass a resolution.

In cases covered by the Convention, the parties to the dispute renounce their vote at the Council, which has therefore only to achieve unanimity among the remainder of its members. Parties to a dispute agree to accept and apply "conservatory measures of a non-military character relating to the substance of the dispute" recommended by the Council to prevent aggravation of the dispute. If one party has invaded or flown over the territory or territorial waters of another, or a demilitarized zone, without a state of war being created, the Council may order the evacuation of the invading forces, and parties undertake unconditionally to obey. Again, if there is no actual state of war, or if there is a danger of war breaking out through a collision between troops, the Council may order them to withdraw behind a demarcation line. These lines must not involve abandoning exterior frontier defence works, or communications essential for supplies or security. The Convention does not affect the freedom of passage through the Suez Canal.

The Council has the right to send commissioners to the spot to supervise the execution of the above conservatory measures. Their rights are strictly limited to this duty, and one party, if it can put forward a "reasoned request", can delay the execution of the measures until the commissioners arrive.

If a party is guilty of persistent violation of the measures prescribed by the Council, the latter shall consider "what means of all kinds are necessary to ensure" its execution; and if war breaks out in consequence of the violation, the party guilty of the violation is considered *prima facie* as having resorted to war within the meaning of Article XVI of the Covenant.

Parties undertake to provide such publicity as the Council thinks fit for its proceedings, decisions, and recommendations.

The Convention does not restrict the powers of the Council laid down in the Covenant. It comes into force for any state ratifying or acceding, ninety days after the ratification or accession has been deposited.

INTERNATIONAL LABOUR ORGANIZATION

VII

HOURS OF WORK IN COALMINES.

On June 18, 1931, the International Labour Conference, at its 15th session, adopted a Draft Convention limiting hours of work in coalmines, which may be summarized as follows:

The Convention applies to workers in both coal and lignite mines, persons engaged in supervision or management who do not ordinarily perform manual work being excluded from its provisions. Hours of work in underground hard coalmines are not to exceed $7\frac{3}{4}$ per day, reckoning the period as from the time the worker enters the cage (or adit) to the time when he leaves it. If the system of weighted averages is used, the interval between the time when the last worker of a shift leaves the surface and that when the first worker of the same shift returns to it is not to exceed $7\frac{1}{4}$ hours.

Underground work in coalmines is prohibited on Sundays and legal public holidays, except for work which must be carried on continuously, ventilation, safety work, &c., necessary survey work and urgent work in connexion with machinery, &c. Such work shall be paid at not less than $1\frac{1}{4}$ times the normal rate. Overtime at this rate may also be permitted in case of accident, actual or threatened, *force majeure*, or urgent work to avoid a breakdown of machinery, &c., or for "workers employed on operations which by their nature must be carried on continuously, or on technical work, in so far as their work is necessary for preparing or terminating work in the ordinary way or for a full resumption of work on the next shift, provided, however, that this shall not refer to the production or transport of coal". Such overtime may not exceed half an hour on any day for any individual worker, and in case of mines in normal operation, not more than 5 per cent. of the total workers ordinarily employed may be employed on it.

Public authority may also allow not more than sixty hours overtime (at the same rate) in the year. All regulations regarding overtime must be made in consultation with employers' and workers' organizations.

In underground lignite mines, the same regulations apply; but collective breaks, not to be counted in the time spent in the mine, not exceeding 30 minutes, may be allowed in cases of proven necessity; the general allowance for overtime may be increased to 75 hours, and a further 75 may be allowed where technical or geological conditions call for it.

In open mines the above provisions do not apply, but the provisions of the Washington Hours Convention apply. Overtime is not to exceed 100 hours in the year, but a further 100 may be authorized by agreement.

The Convention comes into force for states ratifying it six months after ratification by two of the following states: Belgium, Czechoslovakia, France, Germany, Great Britain, the Netherlands, Poland. A state ratifying may denounce it five years after it comes into force.

Within three years of its coming into force, the possibility of a further reduction of hours and of overtime is to be brought up for consideration.

DECISIONS, OPINIONS, AND AWARDS OF
INTERNATIONAL TRIBUNALS
JUDGMENTS AND ADVISORY OPINIONS OF THE PERMANENT
COURT OF INTERNATIONAL JUSTICE

ADVISORY OPINION DELIVERED MAY 15, 1931.¹

ACCESS TO GERMAN MINORITY SCHOOLS IN UPPER SILESIA.

THIS was the first case to be heard by the newly constituted Court elected in September 1930. The matter arose as follows: Difficulties had occurred as far back as 1926 in regard to the attendance of certain children in Polish Upper Silesia at the German Minority Schools, and the Council of the League had adopted a resolution on March 12, 1927, dealing with the question. This resolution, which was concurred in both by the German and Polish Governments, instituted a system of language tests as a basis for admission to the Minority Schools—children who could not speak German being excluded from the schools—but the arrangement laid down was in the nature of a temporary compromise, and was expressly stated to be without prejudice to the legal position under the Geneva Convention relating to Upper Silesia. In 1928 the German Government submitted the legal questions involved to the Court, which delivered a judgment, reported in the Year Book for 1929, substantially in favour of the German thesis, but the exclusion of the children who, as a result of the tests already held, were found not to speak German was continued as a transitional measure for the school years 1927–8 and 1928–9. At the end of 1929, however, the question was again raised in connexion with the next school year, and the Polish Government claimed to continue the exclusion of these children on the ground that the results of the language tests should be regarded as permanent and definitive. The matter was ultimately brought by way of a minorities petition before the Council, which, on January 24, 1931, decided to ask the Court for an advisory opinion on the following question:

“Can the children who were excluded from the German Minority Schools on the basis of the language tests provided for in the Council’s Resolution of March 12, 1927, be now, by reason of this circumstance, refused access to these schools?”

The Court, after considering the history of the matter, comes to the conclusion that there is no ground for suggesting that the arrangement laid down by the Council, with the consent of the two interested Governments, was other than a temporary one, or that it can prevail over the terms of the Geneva Convention as interpreted by the Court. As held in the judgment of April 26, 1928, the declarations of the parents or guardians are conclusive of the right to attend a Minority school; and as a matter of fact there was nothing to prevent a child, who was unable in 1927 to profit by instruction imparted in the language of his minority, from being able to do so some years later.

The Court, therefore, answered the question in the negative. Judge Count Rostworowski dissented and delivered a separate opinion.

¹ Series A/B, No. 40, p. 4. The judgments and advisory opinions are now issued in a single series designated A/B. The Court’s publications can be obtained from the English agents; Allen & Unwin, Ltd., 40 Museum Street, London, W.C. 1.

ADVISORY OPINION DELIVERED SEPTEMBER 5, 1931.¹*Customs Régime between Germany and Austria.*

On May 19, 1931, the Council of the League adopted a resolution requesting the Court's advisory opinion on the following question:

"Would a régime established between Germany and Austria on the basis and within the limits of the principles laid down by the Protocol of March 19, 1931, the text of which is annexed to the present request, be compatible with Article 88 of the Treaty of Saint Germain and with Protocol No. 1 signed at Geneva on October 4, 1922?"

The following states presented written and oral arguments: Germany, Austria, France, Italy, and Czechoslovakia. Before embarking upon the oral proceedings the Court considered the applications of the Austrian and Czechoslovak Governments for the appointment of judges *ad hoc*, and decided by a majority that inasmuch as the arguments advanced by the German and Austrian Governments led to the same conclusion, whereas those advanced by the French, Italian, and Czechoslovak Governments led to the opposite conclusion, the two groups were respectively in the same interest within the meaning of Article 31 of the Statute, and as the Court included a German, French, and Italian judge there was no ground for the appointment of judges *ad hoc*.

Article 88 of the Peace Treaty of Saint-Germain provides as follows:

"The independence of Austria is inalienable otherwise than with the consent of the Council of the League of Nations. Consequently, Austria undertakes in the absence of the consent of the said Council to abstain from any act which might directly or indirectly or by any means whatever compromise her independence, particularly, and until her admission to membership of the League of Nations, by participation in the affairs of another Power."

Protocol No. 1, signed at Geneva on October 4, 1922, in connexion with the financial and economic assistance of Austria, contains a declaration whereby the Government of Austria

"Undertakes, in accordance with the terms of Article 88 of the Treaty of Saint-Germain, not to alienate its independence; it will abstain from any negotiations or from any economic or financial engagement calculated directly or indirectly to compromise this independence.

"This undertaking shall not prevent Austria from maintaining, subject to the provisions of the Treaty of Saint-Germain, her freedom in the matter of customs tariffs and commercial or financial agreements, and, in general, in all matters relating to her economic régime or her commercial relations, provided always that she shall not violate her economic independence by granting to any State a special régime or exclusive advantages calculated to threaten this independence."

By the Protocol of March 19, 1931, the German and Austrian Governments agreed to enter into negotiations for a treaty "to assimilate the tariff and economic policies of their respective countries" on the basis and within the limits of the principles laid down in that Protocol. This instrument proceeds on the following lines:

While declaring that the independence of the two states and full respect for their international engagements are to be completely maintained (Art. I), both Governments undertook (Art. III) to agree on a tariff law and customs tariff which are to be put into force simultaneously and concordantly in Germany and Austria, and the technical execution of which shall be uniform, although each country will enforce its application by means of its own administration (Art. V),

¹ Series A/B, No. 41, p. 37. For a discussion of this case see p. 68, *supra*.

the customs receipts being apportioned according to a quota to be fixed (Art. VI, No. 2).

As between Germany and Austria, export and import duties are in principle to be removed (Art. III).

As regards the economic treaty régime, Article IX, while declaring that both Governments retain in principle the right to conclude commercial treaties on their own behalf, provides on the other hand that the German and Austrian Governments will see that the interests of the other Party are not violated in contravention of the tenor and purpose of the customs union treaty, i.e. the assimilation of the tariff and economic policies of both countries; the negotiations will, as far as possible, be conducted jointly and, notwithstanding that treaties are to be signed and ratified separately, exchanges of ratifications are to be simultaneous.

Disputes which may arise in connexion with the interpretation and application of the customs union treaty are to be submitted for arbitration to an arbitral committee consisting of an equal number of members from each party, whose duty it will also be to bring about a compromise in cases where the treaty provides for a special arrangement or in cases where the treaty makes the realization of the intention of one party dependent upon the consent of the other (Art. XI).

Lastly, the treaty, which is to be concluded for an unspecified duration, may be denounced after three years; it may be denounced before the conclusion of this period, should either of the two countries consider that a decision of the arbitral committee infringes its vital economic interests (Art. XII, and Art. XI, No. 3).

The Opinion of the Court states that "the only question the Court has to settle is whether, from the point of view of law, Austria could, without the consent of the Council, conclude with Germany the customs union contemplated in the Vienna Protocol of March 19, 1931, without committing an act which would be incompatible with the obligations she has assumed under the provisions quoted above".

The Opinion then proceeds on the following lines:

Article 88 of the Treaty of Saint-Germain imposed upon Austria, who in principle has sovereign control over her own independence, an obligation not to alienate that independence except with the consent of the Council. The independence of Austria, within Article 88, must be understood to mean the continued existence of Austria within her present frontiers as a separate state with sole right of decision in all matters economic, political, financial or other, these different aspects of independence being in practice one and indivisible. By "alienation" must be understood any voluntary act by the Austrian State which would cause it to lose its independence or which would modify its independence in that its sovereign will would be subordinated to the will of another Power. The second sentence of Article 88, although connected with the first by the word "consequently", is not limited to acts of alienation proper. The undertaking to abstain from "any act which might directly or indirectly or by any means whatever compromise her independence" can only be interpreted to refer to any act calculated to endanger that independence in so far as can be reasonably foreseen.

As regards the Protocol of October 4, 1922, Austria's undertakings thereunder fall within the scope of the obligations already assumed in Article 88 as appears from the reference made to that provision in the Protocol. A violation

of the "economic independence" expressly mentioned in the Protocol, would be a violation of the "independence of Austria" within the meaning of Article 88 of the Peace Treaty. But the Protocol is a special and distinct instrument open to the accession of all Powers, whether signatory to the Peace Treaty or not, and to which a non-signatory Power—Spain—did in fact accede. The undertakings of Austria in the Protocol therefore possess binding force complete in themselves and capable of independent application.

No useful comparison can be drawn between other customs unions and the one here contemplated because it has not been shown that in any of those cases the countries concerned had assumed any obligations corresponding to those imposed upon Austria in the Peace Treaty and the Protocol of 1922.

As regards the Austro-German Protocol of 1931 the Court observes that what has to be considered is not any particular provision, but rather the instrument as a whole or, better still—to use the actual terms of the question put by the Council—"the régime" to be established on the basis of this Protocol. The establishment of this régime does not in itself constitute an act alienating Austria's independence, for Austria does not thereby cease, within her own frontiers, to be a separate state; and in view of the possibility of denouncing the treaty it may be said that legally Austria retains the possibility of exercising her independence. It may even be maintained that the independence of Austria is not strictly speaking endangered within the meaning of Article 88 of the Peace Treaty.

On the other hand, it is difficult to deny that the projected customs union constitutes a "special régime" which affords Germany "advantages" withheld from third Powers (see Protocol of 1922).

It is useless to urge that the Austro-German Protocol provides that negotiations are to be entered into for a similar arrangement with any other country expressing a desire to that effect, for it is clear that this contingency does not affect the immediate result of the customs union as at present projected between Germany and Austria.

Finally, if the proposed régime be considered as a whole from the economic standpoint adopted by the Protocol of 1922, it is difficult to maintain that this régime is not calculated to threaten the economic independence of Austria and that it is, consequently, in accord with the undertakings specifically given by Austria in that Protocol.

For these reasons the Court, by eight votes to seven, held that "A régime established between Germany and Austria, on the basis and within the limits of the principles laid down by the Protocol of March 19, 1931, would not be compatible with Protocol No. 1 signed at Geneva on October 4, 1922".

The following seven judges concurred in the Opinion of the Court: Guerrero, Count Rostworowski, Fromageot, de Bustamante, Altamira, Urrutia, and Negulesco, but of these all but Judge de Bustamante were of opinion that the projected régime would also be incompatible with Article 88 of the Treaty of Saint-Germain, as constituting an act susceptible of endangering the independence of Austria. Judge Anzilotti, whilst concurring in the operative part of the Opinion, disagreed with the grounds on which it was based and delivered a separate opinion.

President Adatci, and Judges Kellogg, Rolin-Jacquemyns, Sir Cecil Hurst, Schücking, van Eysinga, and Wang dissented and delivered a joint opinion in which they answer the question put to the Court in the affirmative.

ADVISORY OPINION DELIVERED OCTOBER 15, 1931.¹*Railway Traffic Between Lithuania and Poland.*

This case constitutes one incident in the long-standing dispute between Poland and Lithuania which originated in the Vilna affair of 1920. During the war, the Landwarow-Kaisiadorys railway sector, part of the line from Vilna to Libau, was destroyed, and although subsequently repaired, the repair works were themselves destroyed after the Polish General Żeligowski's occupation of Vilna on October 9, 1920. The sector has remained in this state ever since, and there has been no railway communication at all between Lithuania and Poland. The sector is in Lithuanian territory, and the Lithuanian Government declared that it did not intend to restore the line.

Among various other attempts made by the League to improve the relations between the two countries, questions relating to the means of communication between them were referred to the appropriate League Committee, which made certain recommendations on September 4, 1930. These were not accepted by either side and came before the Council in the following January, when it was decided to refer to the Court for advisory opinion the following question:

"Do the international engagements in force oblige Lithuania in the present circumstances, and if so in what manner, to take the necessary measures to open for traffic or for certain categories of traffic the Landwarow-Kaisiadorys railway sector?"

The Opinion of the Court points out that the question does not refer to the application of rules resulting from general international law, but to contractual engagements in force which may create for Lithuania the obligation in question. From the arguments it appeared that the relevant provisions are (1) the Council Resolution of December 10, 1927; (2) Article 23 (e) of the Covenant; (3) the Memel Convention of May 8, 1924.

As to (1), the representatives of Poland and Lithuania participated in the adoption of the resolution and are bound by their acceptance of it. The resolution recommends the two Governments "to enter into direct negotiations as soon as possible in order to establish such relations between the two neighbouring states as will ensure 'the good understanding between nations upon which peace depends'".

According to the view maintained before the Court on behalf of the Polish Government, Poland and Lithuania, in accepting this recommendation, undertook not only to negotiate but also to come to an agreement, with the result—it was alleged—that Lithuania had incurred an obligation to open the Landwarow-Kaisiadorys railway sector to traffic—a conclusion which would decide the question on which the Court was asked for an opinion.

The Court considered that the engagement incumbent on the two Governments in conformity with the Council's resolution was not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements. But an obligation to negotiate does not imply an obligation to reach an agreement, nor, in particular, does it imply that Lithuania, by undertaking to negotiate, had assumed an engagement, and was in consequence obliged to conclude the administrative and technical agreements indispensable for the re-establishment of traffic on the Landwarow-Kaisiadorys railway sector.

¹ Series A/B, No. 42, p. 108.

(2) The provision of the Covenant relied upon is as follows:

“Article 23.—Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:

(e) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League . . .”

It was contended that this bound Lithuania to open the railway sector to international traffic and that if it were once admitted that certain countries would be at liberty, on the ground of political disagreements, to suppress international railway connexions during long periods, the interests of third States, Members of the League, might suffer, since they would no longer enjoy the benefits of freedom of transit and communications to which they are, in principle, entitled under the above provision.

The Court, however, observed that this text clearly states that specific obligations can only arise from the “international conventions” mentioned, and it is, therefore, impossible to deduce from the general rule in (e) an obligation for Lithuania to open the railway sector.

(3) Article 3 of Annex III of the Memel Convention lays down that “the Lithuanian Government shall ensure the freedom of transit by sea, by water, or *by rail*, of traffic coming from or destined for the Memel territory or in transit through the said territory, and shall conform in this respect with the rules laid down by the Statute and Convention on the Freedom of Transit adopted by the Barcelona Conference”.

The Statute of Barcelona to which reference is thus made, lays down, in Article 2, that contracting states “shall facilitate free transit, by rail or waterway, on routes *in use convenient for international transit*”.

The Court points out that the railway sector in question is not *in use*, and therefore this provision does not apply. Moreover, this railway is scarcely *convenient for international transit* to or from Memel, since it only affords communication with Memel by means of a *détour* or by means of reloading on to barges at Kovno.

The Court accordingly answered the question put to it in the negative.

The Opinion was unanimous.

ADVISORY OPINION DELIVERED DECEMBER 11, 1931.¹

Port of Danzig and Polish War Vessels.

By a resolution dated September 19, 1931, the Council of the League submitted to the Court for advisory opinion the following question:

“Do the Treaty of Peace of Versailles, Part III, Section XI, the Danzig-Polish Convention concluded at Paris on November 9, 1920, and the relevant decisions of the Council of the League of Nations and of the High Commissioner, confer upon Poland rights or attributions as regards the access to, or anchorage in, the port and waterways of Danzig of Polish war vessels? If so, what are these rights or attributions?”

The matter referred to had been under discussion ever since the time of the creation of the Free City. Proposals were originally made by Poland for the inclusion in the Convention of Paris of provisions giving her the right to use the port of Danzig for the anchorage, repairing, and victualling of her warships, but

¹ Series A/B, No. 43.

they were never adopted and neither the Treaty of Versailles nor the Paris Convention contain any specific reference to the subject.

Subsequently, the Council and also the High Commissioner dealt with the matter on several occasions, and in October 1921 a provisional arrangement was arrived at between Poland and the Free City which was to remain in force until the question of a *port d'attache*, as it was called, was decided by the Council.

The Court observes in its Opinion that the claims of the Polish Government had not been precisely defined in the course of the argument, Counsel in his conclusions having invited the Court to say that Poland has acquired for her warships, under the denomination of a *port d'attache*, rights of access to and anchorage in Danzig. The general tenor of the argument, however, showed that Poland was claiming that her warships are entitled to go into the port and remain there as of right without obtaining the consent of the authorities of the Free City, and that while in the port these vessels are at liberty to ship such stores and execute such repairs as they may need. No question arose as to the rights of warships in general to enter a foreign commercial harbour. What Poland was claiming was a right peculiar to herself at Danzig, which would give her warships a special position different from that enjoyed by the warships of foreign Powers. The form of the question upon which the Court was asked to advise did not necessitate consideration of the existing rules of international law relating to the admission of warships to foreign commercial ports.

The fact that Poland claims special rights and privileges for her war vessels in the port of Danzig rendered it necessary to find some juridical basis for the claim. The port of Danzig is not Polish territory, and therefore the rights claimed by Poland would be exercised in derogation of the rights of the Free City. Such rights must therefore be clearly established.

As already mentioned, the Treaty of Versailles contains no stipulations as to Polish war vessels. Article 104 refers to the necessity of ensuring to Poland free use of the port for imports and exports, and this is given effect to in Article 26 of the Convention of Paris. But these provisions cannot be held to confer on Poland a right of access and anchorage for war vessels. The Polish Government based its claim not upon the specific terms of the Treaty but upon the principles underlying the establishment of the Free City in accordance with Part III, Section XI. These principles were said to be three in number: Poland's right of free and secure access to the sea; the intimate relations which were to exist between Danzig and Poland; the necessity for providing for the defence of the Free City. It was maintained that the combined effect of these principles was to confer upon Poland the right now claimed.

The Opinion states that the Court is unable to accept this reasoning. The promise to Poland at the time of the peace settlement after the war of 1914-18 of a free and secure access to the sea was a matter of history of which the Court was prepared to take notice, but no materials and no reasons had been submitted for assuming that the contents of Section XI of Part III of the Treaty of Versailles, as carried into effect by the Convention concluded in pursuance of Article 104 of that Treaty, do not constitute a complete fulfilment of the promise. The Court was not prepared to adopt the view that the text of the Treaty of Versailles can be enlarged by reading into it stipulations which are said to result from the proclaimed intentions of the authors of the Treaty, but for which no provision is made in the text itself.

The conclusion of the Court upon this part of the case is that neither the

Treaty of Versailles nor the Convention of Paris, either by the terms of the provisions they contain, or by necessary implication, confer on Poland the right she is now claiming.

Turning to the subject of "relevant decisions" referred to in the question, the Court observes that, in fact, no decisions of the High Commissioner were relied upon. As for the Council, it was clear that no fixed or definitive decision had ever yet been taken. Various examinations of the subject were undertaken, but the legal question was always left open. The Council realized the practical importance of providing shelter and harbour facilities for the vessels of the Polish fleet, but this was not a matter within the jurisdiction of the Court; its task was limited to the interpretation and effect of such treaty stipulations as may be in force and such relevant decisions as may already have been taken.

The Court therefore answered the first question put to it in the negative, and the second did not arise.

The Opinion was arrived at by eleven votes to three, the dissentients being Judges Fromageot, Count Rostworowski, and Urrutia.

ADVISORY OPINION DELIVERED FEBRUARY 4, 1932.

*Treatment of Polish Nationals and other Persons of Polish Origin
in Danzig Territory.*¹

By resolution of May 22, 1931, the Council of the League submitted to the Court the following questions:

"(1) Is the question of the treatment of Polish nationals and other persons of Polish origin or speech in the territory of the Free City of Danzig to be decided solely by reference to Article 104 (5) of the Treaty of Versailles and Article 33, paragraph 1, of the Convention of Paris (and any other treaty provisions in force which may be applicable), or also by reference to the Constitution of the Free City; and is the Polish Government accordingly entitled to submit to the organs of the League of Nations, by the method provided for in Article 103 of the Treaty of Versailles and Article 39 of the Convention of Paris, disputes concerning the application to the above-mentioned persons of the provisions of the Danzig Constitution and other laws of Danzig?"

(2) What is the exact interpretation of Article 104 (5) of the Treaty of Versailles and Article 33, paragraph 1, of the Convention of Paris, and, if the reply to question (1) is in the affirmative, of the relevant provisions of the Constitution of the Free City?"

The occasion for seeking an advisory opinion upon these points was a dispute between Poland and the Free City in regard to alleged unfavourable treatment of Poles at Danzig in matters of education, language, labour, acquisition of landed property, and other things.

Article 104 of the Treaty of Versailles states that:

"The Principal Allied and Associated Powers undertake to negotiate a treaty between the Polish Government and the Free City of Danzig, which shall come into force at the same time as the establishment of the said Free City, with the following objects:

(5) to provide against any discrimination within the Free City of Danzig to the detriment of citizens of Poland and other persons of Polish origin or speech."

Article 33 of the Convention of Paris provides as follows:

"The Free City of Danzig undertakes to apply to racial, religious, and linguistic minorities provisions similar to those which are applied by Poland on Polish territory in execution of Chapter I of the Treaty concluded at Versailles on June 28, 1919, between

¹ Series A/B, No. 44.

Poland and the Principal Allied and Associated Powers, to provide, in particular, against any discrimination, in legislation or in the conduct of the administration, to the detriment of nationals of Poland and other persons of Polish origin or speech, in accordance with Article 104, paragraph 5, of the Treaty of Versailles.

"The provisions of Articles 14 to 19 of the Treaty concluded at Versailles between the Principal Allied and Associated Powers and Poland on June 28, 1919, as also the provisions of Article 89 of the Treaty of Versailles with Germany, shall equally apply to the Free City of Danzig."

With regard to question (1) the Court observes that this does not envisage Poland's right to have recourse to the League in its capacity as guarantor of the Danzig Constitution, but only the right of Poland to have recourse, in its own name, to the system of compulsory arbitration provided for in Article 103 of the Treaty and Article 39 of the Convention in the case of certain disputes between Poland and Danzig. Can Poland avail herself of this procedure in the case of disputes of the nature referred to in the question based upon the application of the Constitution and other laws of Danzig?

The last-mentioned Articles (103 and 39) refer to disputes between Poland and Danzig touching treaty provisions or "any matter affecting the relations between Poland and the Free City", and the Court rejected the Polish contention that this description included differences concerning the application of the Danzig Constitution or laws. In the Court's opinion, the fact that the legal status of Danzig is *sui generis* did not authorize departure from the ordinary rules governing relations between states. The general principles of international law apply to Danzig, subject to the treaty provisions binding upon the Free City, and the peculiar character of its Constitution affects only the relations between Danzig and the League.

"A violation or an erroneous application of the Constitution by Danzig is, therefore, so far as international relations are concerned, a matter solely between the League, as guarantor, and Danzig. With regard to Poland, the Danzig Constitution, despite its peculiarities, is and remains the Constitution of a foreign state. Any grievance which Poland may allege against the Free City arising out of the application by the latter of its Constitution as such cannot therefore give rise between Poland and the Free City of Danzig to differences in regard to a matter affecting the relations between Poland and the Free City within the meaning of Article 39 of the Convention of Paris.

"A state cannot rely, as against another state, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, and conversely, a state cannot adduce as against another state its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force. Applying these principles to the present case, it results that the question of the treatment of Polish nationals or other persons of Polish origin or speech must be settled exclusively on the bases of the rules of international law and the treaty provisions in force between Poland and Danzig.

"The application of the Danzig Constitution may, however, result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law, as for instance in the case of a denial of justice in the generally accepted sense of that term in international law."

Should such a case arise, Poland would undoubtedly be entitled to submit it to the organs of the League under Article 103 of the Treaty of Versailles and Article 39 of the Convention of Paris.

With regard to question (2) the Court held, in the first place, that Article 104 of the Treaty of Versailles contains a mandate, given by the signatories of the Treaty and accepted by the Principal Allied and Associated Powers, to negotiate a treaty between Poland and Danzig with certain specified objects. But the advantages guaranteed to Poland by Article 104 were to be secured to her by the

Convention and the guarantee became effective between Poland and Danzig only in virtue of the Convention.

The object of Article 104 (5) was to provide against any discrimination to the detriment of Polish citizens and other persons of Polish origin or speech. This means discrimination in fact, as well as in law, made on account of Polish citizenship, origin, or speech. A measure which in terms is of general application, but in fact is directed against Poles, would constitute a violation of the prohibition. The text does not contain any standard of comparison in relation to discrimination and the Court declined to read one in—in the opinion of the Court Article 104 does not provide for “national treatment”.

As between Danzig and Poland, the Convention of Paris is the instrument which is directly binding on Danzig; but in case of doubt as to the meaning of its provisions, recourse may be had to the Treaty of Versailles, not for the purpose of discarding the terms of the Convention, but with a view to elucidating their meaning.

The Court then examines Article 33 of the Convention, and observes, in the first place, that as the text is not “absolutely clear” it may be useful, in order to ascertain its precise meaning, to recall in detail the various drafts preceding the final text.¹ As a result of its consideration of all the material at its disposal, the Court comes to the conclusion that the Polish argument, according to which the second part of the first paragraph of Article 33 of the Convention of Paris provides national treatment for Polish nationals and other non-Danzig persons of Polish origin or speech in the Free City, is not justified. Nor, on the other hand, is the argument of the Danzig Government that the second part of the first paragraph of Article 33 adds nothing to the obligation arising from the first part of that paragraph and does no more than confirm that obligation.

In the opinion of the Court, paragraph I of Article 33 of the Convention of Paris should be considered as containing two undertakings. According to the first part of the paragraph, the Free City undertakes to apply to minorities in her territory provisions similar to those applied by Poland in Polish territory in accordance with Chapter I of the Polish Minorities Treaty of June 28, 1919; and the second part contains the undertaking to provide against any discrimination to the detriment of Polish nationals and other persons of Polish origin or speech on account of their Polish nationality, origin, or speech, in accordance with Article 104 (5) of the Treaty of Versailles.

The second undertaking assumed by Danzig, resulting from the incorporation of Article 104 (5) of the Treaty of Versailles in the text of the Convention of Paris, may therefore be considered as a further guarantee that the Free City, whether applying provisions similar to those applied in Poland by the Polish Government to the minorities within its territory, or granting more extensive or additional rights to those minorities or to foreigners not belonging to a minority, will allow of no differential treatment of Polish nationals and other persons of Polish origin or speech to their detriment on account of their Polish nationality, origin, or speech.

The question whether, in a given case, an act or failure to act constitutes a breach of the provisions of Article 33 of the Convention is essentially one of fact to be decided on the merits of each case.

¹ This appears to be an extension of the principle hitherto followed by the Court whereby recourse to *travaux préparatoires* is considered unnecessary when the text is “sufficiently clear in itself”.

The Opinion was adopted by 9 votes to 4, Judges Guerrero, Count Rostorowski, Fromageot, and Urrutia dissenting as regards the reply to question (2). Judges Sir Cecil Hurst and Baron Rolin-Jaequemyns, whilst concurring in the operative portion of the Opinion, disagreed with certain of the grounds on which it was based.

ADVISORY OPINION DELIVERED MARCH 8, 1932.

Interpretation of the Greco-Bulgarian Agreement of December 9, 1927.

The question submitted to the Court by the Council of the League in this case related to a controversy between Greece and Bulgaria arising out of the "Hoover moratorium". When President Hoover proposed the postponement for one year of "all payments on inter-governmental debts, reparations, and relief debts", "not including obligations of Governments held by private parties", the Greek Government made it a condition of acceptance as regards the reparations payments of Bulgaria that certain payments by Greece to Bulgaria on account of the property of refugees should also be suspended. The Bulgarian Government maintained that there was no connexion between the two debts, which it considered to be of an entirely different nature, and brought the matter before the Council under the Greco-Bulgarian Agreement of December 9, 1927, known as the Caphandaris-Molloff Agreement.

Questions arose as to the effect of this document and the powers of the Council thereunder, and the advisory opinion of the Court was accordingly sought upon the following points:

"In the case at issue, is there a dispute between Greece and Bulgaria within the meaning of Article 8 of the Caphandaris-Molloff Agreement concluded at Geneva on December 9, 1927 ?

"If so, what is the nature of the pecuniary obligations arising out of this Agreement ?"

The Caphandaris-Molloff Agreement was the last of a series of provisions negotiated under the auspices of the League for settling the problem of the exchange of populations between Greece and Bulgaria. So far as material, the system established was, broadly, that the real property of the person who emigrated was to be liquidated and acquired by the state he left, which was to be responsible for the compensation due to the emigrant, but as payment in cash was not feasible, a plan was devised whereby the price of the liquidated property was satisfied by bonds issued to the emigrant by the state *to* which he had emigrated. As between the two states, each Government was to become the creditor of the other for the total amount of the debt contracted towards the emigrants who came and settled in its territory, and the state which on balance owed the larger sum was liable to the other state for the difference. Bulgaria was the state which had issued the larger amount of bonds to emigrants, and accordingly Greece was bound, under Article 4 of the Agreement, to make to her certain half-yearly payments. This was the debt that Greece claimed to link up with Bulgaria's reparations obligations, and to suspend if those were suspended.

Article 8 of the Caphandaris-Molloff Agreement provides that "any difference as to the interpretation of this Agreement shall be settled by the Council of the League of Nations which shall decide by majority vote".

The first question submitted to the Court was, as indicated above, whether the present dispute between Greece and Bulgaria was a difference within the meaning of Article 8.

The Opinion of the Court points out that the question which Bulgaria submitted to the Council, namely, whether Greece was entitled to connect the Bulgarian Reparation debt and the Greek Emigration debt and to set off one against the other, is only another way of raising the question of the legitimacy of the Greek attitude in insisting upon the acceptance of her point of view, that if she was to agree to the application of the Hoover Plan to Reparation payments by which she profited, payments under the Greek Emigration debt must also be included in the suspension. She was in effect insisting on the acceptance of her view that the Greek Emigration debt should be regarded as inter-governmental, and also insisting that only in case this point of view was accepted could she accept the Hoover Plan. At a later period, the Greek Government declared that the condition of its acceptance of the Hoover Plan was the suspension of its debt to Bulgaria, irrespective of the nature of that debt as compared with the nature of the Bulgarian debt.

The Court observes that Greece's right to subject her acceptance of the Hoover Plan to a condition has nothing to do with the Caphandaris-Molloff Agreement. On the other hand, it must be admitted that, to the extent that the Greek Government contended that the debt under the Caphandaris-Molloff Agreement was of the same nature as the Bulgarian Reparation debt, it raised a question which could not be decided without referring to the conventional stipulations in force between Bulgaria and Greece on the subject of the emigration of racial minorities, and the liquidation of their property. Any interpretation of the Agreement thus required would, however, be merely incidental and preliminary to another question, itself depending solely on the Hoover Plan. The powers of the Council under Article 8 are restricted to interpreting the Caphandaris-Molloff Agreement and do not extend to the Hoover Plan. Moreover, the nature of the debt under the Agreement would not necessarily determine whether or not it was an inter-governmental debt within the meaning and scope of the Hoover Plan.

It follows that the dispute between the Parties as to whether Greece is entitled to connect the two debts with one another and to set off one against the other, i.e. whether Greece is entitled to insist on the suspension of the Greek debt if the Bulgarian debt is suspended, is one which cannot be decided by determining the nature of the Greek Emigration debt under the Caphandaris-Molloff Agreement, and, therefore, that in the case at issue there is no dispute between Greece and Bulgaria within the meaning of Article 8 of the Agreement.

The first question having thus been answered in the negative, the second did not arise, and the Court states that nothing in the Opinion must be regarded as in any way prejudging the matters referred to in that question.

The Court declined to accede to the desire expressed by both Parties during the oral argument that it should deal with the second question whether the first was answered in the affirmative or not. The Court refers to Article 14 of the Covenant, whereby only the Council and Assembly have the right to submit a question to the advisory jurisdiction of the Court, and holds that the Court is therefore bound by the terms of the questions as formulated in this case by the Council. The second question was put to the Court conditionally upon an affirmative answer being given to the first. To ignore this condition at the request of the Parties would be in effect to allow the two interested Governments to submit a question for advisory opinion.

The Opinion of the Court was adopted by 8 votes to 6 (the Bench including

two judges *ad hoc*), but the dissenting judges (Adatci, Count Rostworowski, Altamira, Schücking, van Eysinga, and Papazoff) did not state their reasons.

ALEXANDER P. FACHIRI.

ARBITRATION BETWEEN PORTUGAL AND GERMANY CONCERNING WAR
DAMAGE TO PORTUGUESE PROPERTY COMMITTED PRIOR TO PORTUGAL'S
ENTRY INTO THE WAR.

Two judgments¹ on this subject, dated July 31, 1928, and June 30, 1930, respectively, were pronounced by a Tribunal consisting of three Swiss jurists, MM. Aloïs de Meuron (President), Robert Guex and Robert Fazy, sitting at Lausanne, and constituted under paragraph 4 of the annex to Articles 297-8 of the Treaty of Versailles. Both judgments are peculiarly rich in the enunciation of general principles of international law,² which are stated with great clarity and precision. The following is a summary, reproducing so far as possible the Tribunal's own language, with occasional comments in footnotes,³ of the main principles affirmed, some of which are of especial interest in the light of recent events:—

Reprisals.

1. Reprisals are only legally justifiable if undertaken in reply to a definitely illegal act (i.e. an act contrary to the rules of international law) committed by the offending state [I, 27].⁴ Put negatively, the failure by one state to observe a rule of international law may justify another state in also failing to observe that, or, it may be, another rule [II, 36]. But where there is no breach of law there can be no reprisals. Thus, the arbitrary expulsion of a consular officer of another state may well constitute an unfriendly act justifying diplomatic representations,⁵ but, as nothing contrary to international law is involved in such an exercise by a state of its sovereign rights, it cannot justify by way of reprisals an armed attack accompanied by all the rigours of war [I, 27].

2. Reprisals must be preceded by a request for redress, which must have proved fruitless. The use of force can only be justified by necessity, i.e. the impossibility of obtaining redress by other means. Such necessity cannot be alleged to exist until attempts have been made to obtain redress by ordinary methods [I, 27-8].

3. Reprisals must not be out of proportion to the offence. Since reprisals consist in committing an act which is, or at any rate otherwise would be, illegal, in response to an illegal act already committed, it is evident that the damage occasioned by the second act must be proportionate to that occasioned by the first. Further, even if it be argued that international law does not go so far as to require that

¹ Published separately by the Imprimerie de la Société de la Gazette de Lausanne et Journal Suisse, Lausanne.

² The principles enunciated of course have reference to the position as it existed prior to the Covenant and other multilateral instruments made since the war. In the light of these, certain of the principles in question may require qualification, particularly those relating to the doctrine of reprisals [see, for instance, Oppenheim, 4th ed., Vol. II, p. 101 et seq., and McNair in *Transactions of the Grotius Society*, Vol. XI, p. 29].

³ Except where otherwise indicated, the views expressed in the footnotes represent the personal opinions of the compiler of this note only.

⁴ The references are to the first or second judgment as the case may be, and to the page.

⁵ Or, it is suggested, retorsions.

the reprisals be *exactly* proportioned to the offence, it certainly regards as unlawful reprisals which are out of *all* proportion to the act which has occasioned them [I, 28].¹

4. Reprisals are only justifiable as against the offending state, and must not be so carried out as to prejudice third parties. This follows from the rule that reprisals are only admissible in reply to an illegal act; hence they cannot be undertaken against any state except the one which has committed the act in question.² It is possible, of course, that legitimate reprisals aimed solely against the offending state may in fact injure the nationals of an innocent state, but this will be an indirect and involuntary consequence which the state exercising the reprisals is bound so far as possible to avoid or to limit [II, 36-7].

Miscellaneous considerations relating to Damages. Remoteness of Damage and Indirect Damages.

5. There must be a direct relationship of cause and effect between the illegal act cited as involving the international responsibility of a state and the damage complained of. It does not suffice that the illegal act created circumstances in which such damage could result, unless it was the direct cause of it [II, 9-10].³

6. The strict rule being, therefore, that only direct damage gives rise to a right to reparation, it is inadmissible to include in an award damages which are related to the initial act only by an unforeseen chain of exceptional circumstances caused by extraneous factors in no way apprehended by the offender; for instance, damages which, though standing in a relation of causality with the original act, yet derive equally from subsequent events [I, 33].

7. Nevertheless, it would not be equitable to deprive the injured party of damages resulting from events which the offender foresaw, and, it may be, willed, merely on the ground that there are intermediate links in the chain of

¹ The rule concerning proportion also applies in this sense, that where reprisals are exercised in order to bring pressure to bear on the offending state to put an end to a continuing act of illegality, they must be limited to what is necessary to achieve this object. However, this does not of course mean that the injured state would be justified in bringing *any* pressure which might in fact prove necessary for this purpose if by so doing damage were inflicted on the offending state out of proportion to the injury.

² From this dictum it appears to follow that pacific blockade, where instituted by way of reprisals, can only be exercised in respect of ships of the offending state and must not be so carried out as to prevent the ingress and egress of "neutral" vessels.

³ The tribunal goes on to give as an example the German invasion of Belgium. This, it is stated, provided the *occasion* for various illegal acts on the part of the German military, but was not the *cause* of those acts. Hence, the responsibility of the German State did not spring from the mere fact of the invasion, but only from the illegal acts of its agents. This statement, while clearly true of the particular acts which the Tribunal had to deal with, is too wide, and is open to misconstruction. Where one state is, in time of war, *legitimately* in occupation of enemy territory, this occupation does not *per se* give rise to a claim for damages merely because it furnishes the occasion for illegal acts. Only the illegal acts themselves give rise to such a claim. As the invasion of Belgium, however, was an illegal violation of Belgian neutrality guaranteed by Germany, the mere fact of a body of German soldiers crossing the Belgian frontier with hostile intent was sufficient to give rise to a claim for any direct damages which might result therefrom, including (since the Belgians were entitled to resist) damages for killing Belgian soldiers and destroying Belgian fortresses—damages which are not recoverable when caused by a legitimate act of war.

causation between these damages and the original offence. Thus, when damages, though resulting indirectly from the original act, are nevertheless the natural and inevitable consequences of it, so that they must necessarily have been foreseen by the offender,¹ an award may be made in respect of them. It is, of course, possible that, although the offender may have foreseen that such damage was likely to occur, he may not and could not have foreseen the full extent of it which did occur. In that case, while he will be liable for *some* damage, he will not be liable for the full extent of it which he could not have foreseen; and it will be for the tribunal to award such sum as seems equitable in the light of all the circumstances [I, 33-5].

8. Damages may also be too remote, in the sense that the person on whose behalf the claim is presented is not the person directly injured, but is only indirectly injured through that person. Thus, where property is damaged, an inter-governmental claim may ordinarily be brought only on behalf of the owners, and not on behalf of any insurance company which, as a matter of private law, may be liable to compensate the owners [II, 23].²

9. When sums are awarded by way of damages to a state in respect of injuries inflicted on its nationals or their property, the government of that state is the sole judge as to the manner in which those sums are to be distributed [I, 11]; and arbitrators are not called upon to decide, as between two persons, both nationals of the claimant state, which of them would, as a matter of private law, be entitled to prefer a claim against the defendant. Thus, if the ship of state A has been damaged by state B, it is immaterial whether the claim is presented by state A on behalf of the shipowners or of an insurance company, so long as both are nationals of state A [II, 40].³

Miscellaneous considerations relating to war and neutrality.

10. A state is responsible for all acts contrary to international law committed or tolerated by its civil or military authorities in occupied territory [II, 9, 19].

11. Property may in time of war be requisitioned⁴ in occupied territory, but only under the conditions prescribed in Article 52 of the Hague Convention of 1907, one of which is that requisitions in kind are, so far as possible, to be paid

¹ Or, it is suggested, should have been foreseen by any reasonable person.

² This statement is rather in the nature of an inference from the judgment as a whole than of any actual dictum of the Tribunal. It must be read in conjunction with paragraph 9.

³ Clearly it would matter a great deal if they were nationals of different states. In that case, the damage to the insurance company being indirect, the position would presumably be that only the shipowners' government could present the claim, leaving the resulting position as between the insurance company and the shipowners to be settled in the courts of one or the other country according to the rules of private law applicable. Circumstances might, however, exist where the insurance company's government would be entitled to present a claim, e.g. possibly in the event of the ship-owning company having gone into liquidation, or, where the insurance company was subrogated to the rights of the assured.

⁴ The Tribunal prefaces this dictum by an affirmation of the general obligation which, they state, is imposed by international law to respect private property, subject, however, to the right of states to depart from this principle where major interests require it. Thus, international law admits, in time of peace, expropriation for reasons of public interest, and, in time of war, requisition. The Tribunal implies, however, that in time of peace, as well as in time of war, compensation must be paid [II, 7-8].

for at once in cash, or, if not, they must be acknowledged by receipts, the amounts due being paid as soon as possible. From this it follows that requisition, in itself lawful, becomes illegal if compensation is not paid within a reasonable time; and the state is responsible for a failure on the part of its agents so to pay compensation [II, 8, 19].

12. Looting is forbidden by Article 47 of the Hague Convention. Hence, if the agents of a state permit looting in occupied territory, the state becomes responsible [II, 8, 19].¹

13. The bearer of a flag of truce, presenting himself as such, is inviolable [I, 28].

14. Neutral territory is inviolable [I, 29].²

15. A neutral state has the right to disarm and intern armed belligerents who cross its frontiers [I, 26].³

*Prize Law.*⁴

16. The judgment of a national prize court operates as an absolute and final judgment *in rem*, from which there is no appeal, and gives a complete and unchallengeable title to any ship, cargo or *res*, the property in which has been transferred or acquired as a result of the judgment.⁵ This principle is unaffected by the fact that the judgment may be bad in law or in fact, or contrary to the principles of natural justice [II, 24–5].⁶

17. Nevertheless, a state is as much responsible for the conduct of its prize courts as for that of any other of its agents acting in its name. A decision of a prize court, therefore, which is contrary to international law or which constitutes a denial of justice, while unchallengeable in the sense that it must stand and that the title to any property transferred by it is and must remain good, will none the less afford grounds for a claim for damages on the part of any state whose nationals have been injured by or deprived of property in consequence of it [II, 24–8].⁷

18. A captor has the right to destroy an enemy prize if military necessity

¹ It is suggested that it would be more accurate to say that the state is responsible if its agents fail to take all such steps as are reasonably possible to prevent looting.

² See, in connexion with this, note 3 on p. 158.

³ And, surely, the duty of so doing also, at any rate if the belligerent troops cross the frontier in a body or in any appreciable numbers and not merely as isolated fugitives (see Hague Convention V of 1907, Article 11).

⁴ The Tribunal's findings under this head are based mainly on the Declaration of London, which, though unratified, was regarded as largely declaratory of what was supposed to be existing law, and which was agreed upon by Germany and Portugal as constituting the basis upon which, for the purposes of the arbitration, their rights were to be determined [II, 23–4].

⁵ The Tribunal adds that this state of things must continue until an international prize court is constituted to act as a court of appeal from the decisions of national tribunals [II, 25].

⁶ In particular, that it is contrary to the rules of international law or constitutes a denial of justice [II, 26].

⁷ This dictum is interesting, incidentally, as affirming the principle, all too often questioned, that a state is responsible for the acts of its judicial, as well as of its executive organs; and that the fact that the judiciary is, under the *national* constitution, independent of the executive, does not in any way absolve the state as a whole from *international* responsibility for the improper actions of the courts.

requires it;¹ and neither the Declaration of London nor any positive rule of international law obliges the captor state in such an event to compensate the owners of neutral cargo on board the vessel [II, 50].²

19. A neutral prize, like an enemy one, must also be taken into port for adjudication, unless the exigencies of the situation prevent it, i.e. according to Article 49 of the Declaration of London, unless the captor vessel would thereby endanger her own safety or the success of the operations in which she is engaged [II, 32, 35].^{3, 4} In no case, however, is the destruction of a neutral vessel carrying cargo destined for a neutral port permissible [II, 44].

20. Articles which, though primarily destined for purely pacific uses, are capable of being employed for warlike purposes may be placed on the list of conditional contraband without any violation of Article 24 of the Declaration of London; but they may not be placed on the list of absolute contraband unless they can be classed as articles *exclusively* employed for war purposes [Article 23 of the Declaration of London]. Thus, pitprops, though primarily used for coalmines, are also capable of use for supporting trenches, and could therefore properly be declared conditional contraband, but they could not be declared absolute contraband by a country rich in coalmines such as Germany, since it could not be contended by her that they were used exclusively for war purposes. Germany was nevertheless justified in declaring them absolute contraband in contravention of Article 23 of the Declaration of London by way of reprisals against an analogous violation by the Allies of Article 25 of that instrument (which specifies certain articles as being entirely free, i.e. as not being susceptible of being declared contraband at all). But Germany was only justified in declaring these articles absolute contraband *vis-à-vis* the Allies, and could not treat them as such to the prejudice of neutrals, since reprisals can only be exercised against the actual offender [see paragraphs 1 and 4 above].⁵

21. According to Article 33 of the Declaration of London, articles of conditional contraband can only be seized if destined for the use of the enemy

¹ The British doctrine confines "military necessity" to two cases: (1) where the prize is not in a fit condition to be sent or taken into port, (2) where no prize crew can be spared for her. The use made of submarines in the last war, and the fact that a submarine can *never* spare a prize crew, has caused it to be suggested that the rule should now be that a submarine may *never* destroy a captured merchantman [see Oppenheim, 4th ed., Vol. II, p. 342].

² According to British doctrine, the cargo ought to be removed if possible, and it is only in the event of both the destruction of the ship being necessary, and the removal of the cargo impossible, that no compensation will be due.

³ In point of fact, the Tribunal appears to assimilate the case of the destruction of neutral and enemy prizes [II, 35] and to suppose that the former as well as the latter can be destroyed, e.g. if no prize crew can be spared. On the basis of Article 49 of the Declaration of London, however, and generally [see note 4, p. 159], this is very doubtful [see Oppenheim, *loc. cit.*, p. 702, and Colombos, *Law of Prize*, p. 265]. The Tribunal's views as to the legitimacy of destruction by submarines is also in conflict with the view stated in note 1 above.

⁴ The rules as to compensation in such an event are also very different from those which obtain in the event of the necessary destruction of an enemy prize [see Oppenheim, *loc. cit.*, p. 703 et seq.], and the Tribunal proceeds to give effect to these.

⁵ The result of this is, of course, to make the placing of the articles in question on the absolute list largely nugatory in practice; just as pacific blockade may lose most of its force if it cannot be maintained against "neutral" vessels.

forces or departments of the enemy government; and according to Article 34 such destination can only be presumed where the goods are consigned to the enemy authorities or to a person who notoriously acts as a supplier to the latter, or to a fortified enemy place or a place serving as a base for enemy forces. But where pitprops were consigned to a town in Wales, even though that town served as a base for British naval forces, it was held that they could not be seized even though on the list of conditional contraband, since they could not possibly be of use to the naval forces there but were clearly destined for the mines [II, 37-8].

Miscellaneous.

22. Where a claim which has been preferred through the diplomatic channel is afterwards submitted to arbitration, the court cannot award a greater sum than was claimed during the original diplomatic discussions; for had the defendant state then paid that sum, its liability would have been completely discharged [II, 39].

23. Strict proof must be adduced by a claimant state of the act complained of, of its author and of its illegality; but as regards proof of the exact extent of the damages, arbitrators are entitled to relax the rule so as to act, if necessary, on presumptions, taking into consideration any special difficulties, arising from the circumstances of the case, which may have prevented the injured parties from ascertaining all that occurred [II, 9].

G. G. FITZMAURICE.

INTERNATIONAL JOINT COMMISSION, UNITED STATES AND CANADA.

Indemnity for Damages. On February 28, 1931, the United States-Canadian International Joint Commission, to which a claim for damages for injuries to property in the State of Washington, caused by fumes from the smelter of the Consolidated Mining and Smelting Company at Trail in British Columbia, had been referred in pursuance of the Treaty of January 11, 1909, between the United States and Great Britain, made a report in which it estimated the amount of the damages sustained by the claimants up to January 1, 1932, at \$350,000. The Company having commenced the installation and operation of works for the reduction of the fumes, the Commission recommended that it be required to proceed as expeditiously as possible with the construction of the said works and the erection of such others as might be necessary to prevent all future injuries. It further recommended that both Governments appoint scientists to study and report upon the effect of the works so constructed. It expressed the opinion that, if its recommendations were fully complied with, there would be no future indemnities to pay. The United States waived its claims for damages to lands belonging to it. The Commission held, however, that the county in which the injuries occurred was entitled to compensation for damages to property owned by it, the same to be paid out of the \$350,000 awarded, but that it was not entitled to compensation for alleged loss of taxes by reason of the injury caused by the fumes, such loss being too remote and indefinite to permit of adjudication. For the same reason no indemnity was recommended for alleged loss of trade by business or of income from professions.

The recommendations of the Commission were submitted to the two Governments for such action as they might see fit to take.¹

¹ The text of the Report may be found in the *American Journal of International Law* for July 1931, pp. 540 ff.

UNITED STATES-CUBAN ARBITRATION.

Indemnity for Damages. On October 1, 1929, the Governments of Cuba and the United States signed a protocol for the arbitration of the claim of C. J. Harrah, an American citizen, against the Republic of Cuba, on account of damages sustained by him in connexion with the destruction of a narrow-gauge railroad on the beach of Mariano. The claim was referred to two arbitrators, one appointed by each Government. It was agreed that in case they were unable to agree, the claim should be submitted to a neutral arbitrator. The American and Cuban arbitrators agreed that Cuba was liable, whereupon the Government of Cuba offered to pay the United States the sum of \$350,000 in full settlement of the claim. The offer was accepted by the United States.

JAMES W. GARNER.

DECISIONS OF NATIONAL TRIBUNALS INVOLVING POINTS OF INTERNATIONAL LAW

DIGEST OF THE DECISIONS OF THE ENGLISH COURTS DURING THE YEAR 1931.

*Introductory Note.*¹

In the case of *The Civilian War Rights Association v. The King* (1) the suppliants, who represented a number of civilians who had suffered injuries through the acts of Germany during the war, claimed that they had a right to be paid the amounts of their claims for such injuries out of the moneys received by the Crown from Germany by way of reparations under the peace treaties, on the ground that ministers of the Crown had promised that they should be compensated; that they had been invited to file the amounts of their claims, which they had done; that, under the peace treaties, Germany had undertaken to pay reparations *inter alia* for such injuries; that the claimants' claims had been included in the reparations bill submitted to Germany, and Germany had paid sums by way of reparations. It was contended that, in respect of these moneys received from Germany, the claimants' claims had a prior charge, and the Crown was an agent or trustee for the claimants in respect of such sums. The High Court, Court of Appeal, and House of Lords all unanimously rejected this claim, on the ground that the Crown, in making and carrying out an international treaty and in distributing money received from a foreign Power under a treaty, was acting under its prerogative power and could not be in the position of an agent or trustee for any individual British subject or any class of British subjects, and that there was no evidence whatever that the Crown had constituted itself an agent or trustee. The Crown, in respect of moneys received under treaty, was no doubt under a duty to dispose of the money properly, but its position was not that of an agent accounting to a principal, but that of a sovereign dispensing justice to its subjects, and the responsibility rested on the advisers of the Crown, who were responsible in this respect to Parliament alone.

¹ The numbers in parentheses following the names of cases in this note refer to the numbers of the cases in the digest which follows. All cases reported in the Law Reports for 1931 and in contemporary reports covering the same period are reviewed. Cases which will appear in the Law Reports for 1932 are reserved for next year, although they may have appeared already in other reports. (*The Russian and English Bank v. Baring Brothers* 48 T.L.R. 193, and certain other Russian Bank cases fall into this class. Also the cases of *Administrator for Hungarian Property v. Fine Gold* 47 T.L.R. 288, and *Administrator for Austrian Property v. Russian Bank for Foreign Trade* 47 T.L.R. 550, which deal with a question which is to be the subject of an appeal to the Court of Appeal.) One case which has at the time of writing already appeared in the Law Reports for 1932 is, however, included (no. 3) as is also one Scottish decision of 1929 which deals with a question closely connected with two English decisions of the period under review. On the other hand, the decision of the House of Lords in *Ellerman Lines Ltd. v. Murray*, [1931] A.C. 120, which affirmed (and for the same reasons) the decision of the Court of Appeal in the *Croxeth Hall*, [1930] P. 20 and [1930] P. 197, on the construction of the Merchant Shipping (International Labour Conventions) Act 1925, is not included, on the ground that the decision of the Court of Appeal was fully dealt with in the 1931 volume of the *Year Book* at pp. 183 and 198, and no new point of general interest arose in the House of Lords.

This decision in fact merely affirms a general principle of English law which had already been laid down clearly in 1876 in a somewhat similar case, namely *Rustomjee v. The Queen*¹—a decision of the Court of Appeal. The principle now, however, has the additional authority of the House of Lords.² This is, of course, a decision on a question of English municipal law concerning the relations of British subjects and the Crown, though it deals with a matter directly connected with international affairs.

It is interesting, however, to compare the position in English municipal law on this point with certain decisions of the Permanent Court of International Justice, in which the position in international law, when a state makes claims against another state in respect of injuries suffered by its nationals and receives payment in respect of such injuries, is explained. It will be seen that on this question the principle of English law coincides exactly with the position in international law as explained by the Permanent Court of International Justice. In the *Mavrommatis*³ case the Permanent Court of International Justice explained that, when a state makes a claim against another state in respect of injuries to its nationals, the *state itself* is the claimant and is really claiming reparation for an injury done to itself in the person of its national by reason of some breach of international law, and in the *Chorzow Factory*⁴ case, the Court said that the compensation recovered under a judgment of the Court by Germany from Poland in respect of injuries to two German companies was money owing by Poland to the German Government, and not to the German companies, and Poland was therefore not concerned with the manner in which Germany disposed of the compensation when she had received it.

It was on this ground that the Court refused, in dealing with the question of compensation due to Germany, to divide the compensation payable as between the two companies. The case is all the more interesting because in a minority opinion the opposite view was expressed, namely that Germany, in making a claim against Poland in respect of injuries to German companies, was in some respects acting as a mandatory of the two companies.⁵

The case of *The King v. Corrigan* (2) is an extradition case which raises one or two interesting points.

C. had obtained money from various persons in England on the understanding that such moneys were to be applied by him for the purchase of certain oil shares on their behalf, and he had misappropriated the money. His acts might, under English law, constitute two possible offences: i.e. either the offence of fraudulent conversion of sums of money entrusted to him, under Section 20 of the Larceny Act, 1916 (maximum penalty seven years' penal servitude), or the offence of obtaining money by false pretences, under Section 32 of the Larceny Act (maximum penalty five years' penal servitude). Warrants were issued by a London magistrate against him, and in these warrants the charge against him was framed

¹ 1 Q.B.D. 487 and 2 Q.B.D. 69.

² The point was also brought out in the decision of Roche J. in the High Court, that this general principle applies, except in so far as an Act of Parliament, or orders made under the authority of an Act of Parliament, provide otherwise, and that there was no statutory provision applicable to the present case.

³ *Publications of the Court*, Series A, No. 2, at p. 11.

⁴ *Ibid.* No. 17, p. 26. See also *British Year Book*, 1930, pp. 4–8, article on the "Decisions of the Permanent Court" by W. E. Beckett.

⁵ *Publications of the Court*, Series A, No. 17, at p. 95.

as being that of false pretences. As C. was in France at the time, requests for his extradition were made to the French Government under the Extradition Treaty of 1876. C. was arrested in France, and, in accordance with French law, brought before the French Court, where the charges¹ against him were made known to him and he declared his willingness to be sent back to England to be tried on these charges. As a result it was not necessary for the French courts to make any order for his extradition, and C. was taken in custody by the French police to Boulogne and handed over to the English police on a boat for England. After his arrival in England he was committed for trial at the Central Criminal Court, and at his trial there were two indictments against him, based on the same facts, of which the first framed the charge as one of fraudulent conversion, and it was upon this indictment that he was convicted. He appealed against his conviction to the Court of Criminal Appeal, on the ground that he had been extradited from France on a charge of false pretences, and there was consequently no jurisdiction to try him on the indictment for fraudulent conversion. His case was based on Article 4 of the Extradition Treaty, which provides that a person surrendered "shall not be tried for any crime or offence committed in the other country *other than the crime for which surrender has been granted*".²

¹ i.e. the warrant showing the charges were false pretences and the depositions showing the facts on which these charges were based.

² The facts were similar to those of the case of the *United States v. Rauscher* (1886), 119 U.S. 407, before the Supreme Court of the United States, except that in that case the extradition was for a major offence and the conviction (obtained on evidence of the same facts as those deposed to in the extradition proceedings) was for a minor offence. A man extradited from Great Britain on a charge of murder was tried and sentenced in the United States for inflicting, as second mate of an American ship, cruel and unusual punishment on a member of the crew. In that case, which seems not to have been cited in *Rex v. Corrigan*, the conviction for the lesser offence was quashed by a decision of the majority of the Court, against the dissent of Waite C.J., on the ground that the relevant extradition treaty with Great Britain impliedly bound the United States only to proceed on the charge for which extradition had been granted, and also that in any event such an obligation was a principle of international law binding as such upon all courts in the United States. Chief Justice Waite held, on the contrary, that this was not the true interpretation of the treaty, and that no principle of international law entitled a prisoner to raise by way of defence the plea that he was indicted on a charge other than that on which he had been surrendered. The Chief Justice in this connexion quoted from a speech of Lord Cairns in the House of Lords, sitting in its legislative capacity, in which that very great authority, speaking from the Woolsack, said that "nothing can be more clear than that a prisoner himself has no right to raise such a defence . . . he is within the jurisdiction of the Court, which has the authority to try him for the offence of which he is charged . . . whether he ought to be tried for an offence other than that for which he has been surrendered is a matter of diplomacy between the two countries, and not a question between the prisoner and the Court before which he is being tried." The case, when compared with *Rex v. Corrigan*, well illustrates the difference between the position of treaties in English and American law.

Another case in a foreign court, equally not referred to in *Rex v. Corrigan*, but digested in the *Annual Digest of Public International Law Cases* for 1925-6 (Case No. 234), is a German case before the criminal chamber of the Reichsgericht, where a German national, extradited to Germany from Spain, alleged that his offence was political and relied on the fact that the German-Spanish Extradition Treaty did not apply to political offences. The German Court held that it is the right of the extraditing

The first question was whether in the circumstances it could be said that C. had ever been extradited at all, in view of the fact that he had consented to come back to England to be tried, and no formal order for his extradition from France was ever made. If so, of course the article of the Treaty could have no possible application. It was contended on behalf of the Crown that C. had not been extradited, and the majority of the Court of Criminal Appeal accepted this view.¹

It was not, however, upon this ground that the Court of Criminal Appeal as a whole based its decision. It is, of course, well known that in England, unlike a number of other countries,² a treaty is not of itself "law" which the courts can apply as such, though they may in certain cases be able to take account of it as a fact. There is in the Extradition Act of 1870 a section (Section 19) which provides that a person who has been extradited may not be tried for any crime other than a crime "which may be proved by the facts on which the surrender was granted". It was clear, of course, that the trial of C. on the charge of fraudulent conversion was justified under Section 19, seeing that the charge of fraudulent conversion was based upon the same facts as the charge of false pretences upon which his extradition had been requested. If the case for C. had been that the treaty itself cut down and altered the effect of Section 19 of the Act, it clearly would not have been a contention which the Court could have accepted, but this is not the way in which the case was put for C. The argument for C. was based upon Sections 2 and 5 of the Extradition Act, 1870, which provide that the Act only applies to the various foreign countries when an Order in Council to this effect is made, and which give the Crown power by Order in Council, when applying the Act to a given foreign country, to render the application of the Act subject to conditions and qualifications, and require that the terms of the Extradition Treaty should be embodied in the Order in Council. The Act had been applied to France by an Order in Council of 1878, which embodied the Treaty of 1876 (including therefore Article 4). The argument for C. therefore was based, not upon the Treaty as such, but upon Sections 2 and 5 of the Extradition Act, and upon the Order in Council which set out the Treaty, and the contention was that Article 4 of the Treaty constituted a condition or qualification to the application of the Act to France, made by Order in Council, in accordance with the powers given by these sections of the Act.

This contention the Court of Criminal Appeal rejected. The passage in the judgment dealing with this point, however, is extremely short, and perhaps does not show quite clearly upon what ground it was rejected. One of the principal

state, and not of the extradited individual, to claim that extradition was not granted in pursuance of a treaty obligation, and, further, that no general principle of international law prohibited extradition for a political offence.

The writer is indebted to Sir J. Fischer Williams for the reference to, and the above summary of, these two cases.

¹ It is plain, of course, that if the trial of C. on a charge of fraudulent conversion had been contrary to the provisions of Article 4 of the Treaty, the French Government (whatever the position of C. might have been under English municipal law) might have had cause for complaint. No such complaint was, however, made, and it was stated by counsel for the Crown in the course of the argument that the French Government took the view that C. had not been extradited under the treaty.

² See the immediately preceding footnote, and compare the note in the *Year Book* for 1931, at p. 183, on the case of the *Croxeth Hall*, [1930] P. 20.

arguments, however, on behalf of the Crown on this point was that Article 4 of the Treaty was intended to, and did, bear the same meaning as Article 19 of the Act, i.e. that the words "crime or offence" in Article 4 of the Treaty referred, not to the manner in which the charge was formulated under the law of one or the other country, but to the substance of the matter, i.e. the state of facts upon which the extradition was granted—an interpretation which seems to be supported by the consideration that the courts of France, in granting extradition to England, are hardly likely to concern themselves with the section of the English Larceny Act under which the charge was framed, or other technicalities of English law, but only with the charges of fact upon which the extradition is requested. It would appear to be probable that the Court of Criminal Appeal really accepted this argument, and that it is upon this interpretation of Article 4 of the Extradition Treaty that the judgment is based. There are remarks of the different judges during the argument of the case, which are reported in *The Times Law Reports*, which certainly suggest that this is the view which the Court took upon the interpretation of the Treaty.

There is another extradition case in the period under review, *Kossekechatko v. The Attorney-General for Trinidad* (3), which also deals with the Extradition Act of 1870, and the Anglo-French Extradition Treaty of 1876. This was the case of the escaped convicts from the French penal settlement at Devil's Island, French Guiana, who succeeded in reaching in a small boat the British colony of Trinidad. The French authorities requested their surrender under the Treaty, and, in support of the demand for extradition, there was produced before the courts of Trinidad evidence that these persons had been convicted of various crimes by courts in France. The courts of Trinidad ordered the extradition of these men, and from this order an appeal to the Privy Council was brought. The principal point in the appeal was that there was no evidence that the crimes of which these persons had been convicted were crimes committed on French territory, and that both the Extradition Act and the Treaty only provided for extradition in respect of crimes committed on the territory of the state demanding extradition, and that the language of these instruments made it clear that this was so whether the persons to be extradited were persons who had already been convicted, or persons who were required for trial. Consequently, since evidence on this essential point was lacking, the order for their extradition was wrong and the appellants should be released. The Privy Council upheld the contention of the appellants and reversed the decision of the Supreme Court of Trinidad. It was contended on behalf of the respondents in the appeal that a conviction by a French court was *prima facie* evidence that the conviction was in respect of a crime committed in France, and that therefore the onus was on the appellants to show that the conviction was not in respect of crimes committed in France. This contention the Privy Council rejected, upon the evidence of French law, which showed that the French courts had jurisdiction, particularly where the accused were French nationals, to try accused persons for crimes committed elsewhere than in France.

There are three cases relating to nullity of marriage which are of considerable interest. In a previous number of the *Year Book*¹ attention was called to the manner in which the House of Lords in the case of *Salvesen v. The Administrator of Austrian Property*² had reversed the views hitherto prevailing as regards the

¹ 1928, at pp. 126, 169, and 181.

² [1927] A.C. 641.

jurisdiction to pronounce decrees of nullity, and the extent to which this decision appeared to confirm and establish as a principle of English (and Scottish) law the general rule that, in matters of personal status, the law of the domicile applied and the jurisdiction of the courts of the domicile was pre-eminent, if not exclusive. It was suggested in 1928 that this judgment "resembles in many respects the first decision of the Court of Appeal in *Sottomayer v. de Barros*, and an interesting subject of speculation is presented in the question whether, like that case, it will be followed by a reaction cutting down the extent of its application".

The three cases, which it is now proposed to review, seem to show that, so far from subsequent decisions tending to put a narrow interpretation upon the *Salvesen* case, the tendency on the contrary is to give the widest effect to the principles enunciated therein.¹ In the first of these cases, *Inverclyde v. Inverclyde* (4), the English court held that it had no jurisdiction to entertain a petition of nullity of marriage on the ground of impotence in a case where the marriage had been celebrated in England and the parties were resident there but were domiciled in Scotland. It is to be presumed that the English courts would not recognize the jurisdiction of the courts of a foreign country in a converse case.

The first point which calls for comment is that "residence" no longer seems to be a basis for jurisdiction in nullity cases of any kind.² The second point, which seems clear, is that the courts of the country in which the marriage is celebrated have as such no jurisdiction to pronounce nullity of marriage *on the ground of impotence*. It is still not clear whether in nullity matters the courts of the country where the marriage was celebrated possess jurisdiction where a decree is sought:

- (a) on the ground that the necessary formalities for the celebration of a marriage were not fulfilled; or
- (b) on the ground that the parties did not possess the capacity to contract the marriage; or
- (c) on the ground of mistake (*no consensus ad idem*).

Counsel for the respondent in the *Inverclyde* case sought to make a distinction between petitions based upon impotence and petitions based on the above three grounds (*a*, *b*, and *c*), arguing that in these three cases there was a concurrent jurisdiction possessed both by the courts of the domicile and those of the *locus contractus*, whereas in cases of impotence the marriage was voidable, not void, and the decree was really in *pari materia* with a decree of dissolution of marriage, and consequently the jurisdiction of the courts of the domicile must, as in divorce, be exclusive.

¹ Cf. the case of *H. v. H.*, [1928] P. 206. *Year Book*, 1929, at p. 247, a divorce case. It would appear that the dominant consideration at present influencing the English courts is the consideration that if, in matters of personal status, they do not (speaking generally) bow to the law and courts of the domicile, the result will be that persons are held to be married in England and not married in the country of their domicile, and vice versa, a most regrettable result which is best avoided by allowing the view taken in the country to which the parties belong to prevail.

² In *Mitford v. Mitford*, [1923] P. 130, a decree of nullity pronounced by a German court on the ground of mistake (*no consensus ad idem*) was recognized in a case where Germany was (*a*) the country in which the marriage was celebrated; and (*b*) the country in which the parties were resident (though England was the domicile). The judgment rather indicates that (*b*) was regarded as founding the jurisdiction. Nevertheless, it would appear now as if the decision must be justified (if it can still be regarded as good law) on (*a*).

The greater part of Bateson J.'s judgment indicates that he accepted this distinction,¹ and that, therefore, his decision must not be taken as in any way contrary to the existence of a concurrent jurisdiction in the courts of the *locus contractus* to entertain nullity petitions on any of the three other grounds. On the other hand, he professed to be following, in reaching this decision, the House of Lords in the *Salvesen* case (where the courts of the domicile had pronounced a decree of nullity on the ground of informality of celebration), and cited long passages from the speeches of the Law Lords, which argue that any decree of nullity (whether based on informality, or impotence, or any other ground) is a judgment *in rem* in a matter of status, in respect of which the courts of the domicile are pre-eminently (and perhaps exclusively) competent—the House of Lords having disapproved the distinction drawn by the Scottish Court of Session between decrees based on impotence and those based on other grounds. As, however, the House of Lords did not purport to decide whether the jurisdiction of the courts of the domicile was *exclusive* in all nullity suits, the concurrent competence of the courts of the *locus contractus* in suits based on grounds other than impotence is probably best regarded as still at least an open question.

The second case, *de Massa v. de Massa* (5), was a decree of nullity on an undefended petition. Its authority as a precedent is, therefore, weaker for this reason. The parties were domiciled in France, but the marriage had been celebrated in England. The French court had given a decree annulling the marriage on the ground that the petitioner, a minor, was only competent to contract a marriage with the consent of her father, which had not been given to this marriage, and the President granted a decree saying "A French court of competent jurisdiction had annulled the marriage and therefore he declared it to be null and void".

The first point to be noticed is that the English decree is entirely based on the French decree. It is really only a declaration that the French decree is one which must be recognized in England. The case is hardly an authority one way or the other on the question whether the English courts possess *original* jurisdiction to grant a decree of nullity on the ground of absence of capacity or informality of celebration, as being the courts of the *locus contractus*.

The second point is more important: it is in England forbidden to celebrate the marriage of a minor without the consent of his parent or guardian, but, if nevertheless the marriage takes place, the absence of this consent does not invalidate it. Lord Merrivale in this case recognized a decree of the court of the domicile annulling a marriage celebrated in England which was valid by English law. His decision is clearly inconsistent with *Ogden v. Ogden*,² but that case was so severely criticized by the House of Lords in the *Salvesen* case that its authority was already severely shaken. There is, however, a long line of English cases (including *Simonin v. Mallac*³ and *Ogden v. Ogden*) which are conveniently collected in Dicey's *Conflict of Laws*, 4th ed., pp. 689–90, to the effect that the consents of, and notices to, parents and others, necessary by many laws to the validity of a marriage, are considered as part of the form and ceremony of the marriage, and, therefore, to be governed by the *lex loci celebrationis*, and not as a matter of capacity of the parties to be governed by the *lex domicilii*. This view, as Dicey and other writers have very justly observed, is logically open to serious criticism.

¹ See, however, *Newbould v. Attorney-General*, [1931] P. 75. If a decree of nullity of marriage is granted on the ground of impotence, the marriage is void *ab initio*. Is the distinction valid? ² [1907] P. 107 and [1908] P. 46. ³ 2 Sw. & Tr. 67.

Lord Merrivale's decision in this case must, it would appear, be based upon one or other of the following grounds:

- (1) that, where a party to a marriage requires, under his or her personal law, the consents of parents or guardians in order to render him or her capable of marriage, this is a matter of capacity and governed by the law of the domicile, and the absence of such consents will render a marriage celebrated in England invalid, although by the law of England the absence of such consents does not invalidate the marriage:

(If this is the true ground of the decision, it means that the President has felt himself able to refrain from following the long line of English cases referred to above, and to rid English law of a doctrine which it has always seemed difficult to justify); or

- (2) that, if a decree of nullity is pronounced by a court of the domicile, such a decree, being a judgment in a matter of personal status of the court whose jurisdiction is pre-eminent in such matters, must be accepted everywhere (unless perhaps if it is founded upon grounds contrary to English public policy), even if it is a decree declaring invalid a marriage celebrated in England which was valid in English law.

If the latter is the true ground of the decision, it would appear that, in the case under discussion, the petitioner would not have been able to obtain her decree of nullity unless she had first had recourse to the court of her domicile, and obtained a decree there.

The third case is the Scottish decision in *Lendrum v. Chakravati* (6). In that case a girl, whose domicile of origin was Scotch, had married in a church in Scotland a Hindu domiciled in British India, and after the marriage she had followed her husband to India and lived some time there with him. In the proceedings she sought a decree of nullity on grounds which may be conveniently summarized for the moment as (a) absence of capacity, and (b) fundamental mistake.

The first issue was the question whether the decree was one which the Scottish courts had jurisdiction to entertain. Lord Morrison held that at the time when the suit was presented to the court, the domicile of both parties was British India. He said that, when a woman goes through a ceremony of marriage with a man, and then lives with him and goes to his country on the assumption that she is validly married to him, she acquires thereby a domicile in the country where his domicile is, and that this was the case, *even if the validity of the marriage was in issue*. Although Lord Morrison's reasoning on this point does not appear to be consistent with that of the English Court of Appeal in *Ogden v. Ogden* (but is there anything in *Ogden's* case which can be now considered to be good law?), it appears to be sound. Lord Morrison held, however, that in the present case the Scottish courts had jurisdiction, as the courts of the country in which the marriage was celebrated; a jurisdiction which was concurrent with that of the courts of the domicile.

Lord Mackay, before whom the case came later for a decision on the merits, observed that *Salvesen's* case had not been cited to Lord Morrison, but he said that he thought that the speech of Lord Haldane in *Salvesen's* case "left open a somewhat narrow platform for the *forum loci celebrationis*".

On the question of jurisdiction, therefore, this case is an authority in favour of the view that, in suits for nullity, the courts of the *locus celebrationis* have a concurrent jurisdiction where a decree is sought on the ground of a mistake or absence of capacity, and presumably also on the ground of informality.

In the light of all these cases (including the *Salvesen* case) it would seem that the present position with regard to jurisdiction in nullity cases may be stated as follows:

I. The English courts have jurisdiction to entertain a suit for a declaration of nullity of any existing marriage:

- (i) where the parties are domiciled in England;
- (ii) (*probably*) where the marriage was celebrated in England, provided that the suit is based upon:
 - (a) informality of celebration;
 - (b) incapacity of the parties; or
 - (c) mistake;

but not if the suit is based upon impotence.

II. (1) The courts of a foreign country have jurisdiction to declare the nullity of any marriage:

- (i) where the parties are domiciled in such country;
- (ii) (*probably*) where the marriage was celebrated in such foreign country provided that the suit is based upon:
 - (a) informality of celebration;
 - (b) incapacity of the parties;
 - (c) mistake (or some similar ground);

but not if the suit is based upon impotence.

- (2) The decree of a foreign court of competent jurisdiction, declaring the nullity of a marriage, will be recognized in England, unless (*probably*) the decree is on a ground which cannot be recognized on grounds of public policy; but a decree annulling the marriage celebrated in England of a minor, on the ground that the consents necessary under the law of such minor's domicile were not obtained is not a decree founded on a ground which it is contrary to public policy to recognize although in English law such consents are not essential to the validity of the marriage.

In order to appreciate the change which recent cases have brought about, the above statement may be compared with the corresponding rules formulated in Dicey's *Conflict of Laws*.¹

Apart from the question of jurisdiction, there are some points in *Lendrum's* case (6) which are worth consideration. The Petitioner sought a decree of nullity on alternative grounds:

(a) That the marriage, being one entered into with a man whose personal law permitted polygamy, was therefore a polygamous marriage and consequently one which the Petitioner was incapable of entering into on the ground that her personal law did not permit of polygamy. This contention was rejected by Lord

¹ *Conflict of Laws* (4th ed.), p. 302, Rule 65; "The Court has jurisdiction to entertain a suit for a declaration of nullity of any existing marriage:

- (1) where the marriage was celebrated in England, or
- (2) where the respondent is resident in England, not on a visit as a traveller, and not having taken up that residence for the purpose of the suit, or
- (3) where the parties are domiciled in England.

p. 426, Rule 100. "The Courts of a foreign country have jurisdiction to declare the nullity of any marriage celebrated in such country, but not to declare on the ground of informality of celebration the nullity of any marriage celebrated in England and valid by English law."

Mackay on the ground that a marriage entered into in Scotland under Scottish law was a monogamous marriage, even if the personal law of the husband permitted polygamy. In so deciding Lord Mackay was following the English decisions in *Chetti v. Chetti*¹ and *Rex v. the Superintendent Registrar of Marriages, Hammer-smith*.² It is the *lex loci contractus*, and not the law of the domicile of the husband, which determines whether a marriage possesses a monogamous or a polygamous character. It is worth noticing that Lord Mackay said that, if the marriage *had* been one of a polygamous character, it would have been one which a woman domiciled in Scotland would have been incapable of contracting.

(b) The Petitioner's second contention was that the marriage was one which the Hindu husband was incapable of contracting under the law of his domicile (Hindu law) which did not recognize any marriage entered into by a Hindu with a person who was not also a Hindu. Lord Mackay rejected this contention on the ground that this provision of Hindu law was not really a provision relating to the capacity of a Hindu domiciled in India, but rather in the nature of a prohibition against mixed marriages of Hindus, and was not one whose extritorial operation was recognized under the rules of private international law.³

(c) Lord Mackay, however, accepted the Petitioner's third contention, and granted her a decree of nullity upon it. This contention was that there was no *consensus ad idem* (fundamental mistake). The Petitioner intended to, and thought that in entering upon this marriage she would acquire in the country of her husband's domicile the legal status of a wife, whereas in fact in British India she could not by this marriage acquire that status at all.

The decision on this last point is noteworthy. It has not infrequently happened that an English woman, who marries in England a foreigner, discovers after the marriage that it is one which is void in the husband's country. This has been the case even where the husband is a Christian, if he is of the Orthodox religion, and his country is one where that Church is the established Church. This unfortunate situation was the reason for the grant of a decree of divorce by the English courts in *Stathatos v. Stathatos*,⁴ although the parties were not domiciled in England, an exception to the general rule of the exclusive jurisdiction of the courts of the domicile, which may not have survived as the result of various recent cases. This Scottish case appears to point to a better means of dissolving this tangle than by the grant of a decree of divorce by way of exception to the general rule as to jurisdiction—a means better, perhaps, also than the recognition of the foreign decree of nullity in cases where this has been obtained, as, being based upon religious grounds, such a decree may be contrary to the views of public policy of the English courts.

The case of *Collins v. The Attorney-General* (7) is of interest for two reasons. In the first place the decision followed the cases of *In re Ross*, and *In re Askew*, reviewed in the *Year Book* for last year,⁵ in holding that where, under English law, a matter is governed by the law of Germany as the law of the domicile, this means the whole of German law, including the rules of private international law applied by the German courts, and that where, under German law, this same matter is held to be governed by English law as the law of the nationality, and English law in this connexion means the whole of English law, so that a *circulus inextricabilis* may appear to result, the English courts decide the matter by

¹ [1909] P. 67.

² [1917] 1 K.B. 634.

³ Cf. *Chetti v. Chetti*. See p. 182, *post*.

⁴ [1913] P. 46.

⁵ *British Year Book of International Law*, 1931, on pp. 174 and 185.

applying that law to the case which the evidence shows the German courts would apply in these circumstances. The evidence of German law in this case was to the same effect as that given in the case of *In re Askew*, namely, that in such circumstances, German law accepts the *renvoi* and applies German law, and consequently in this case the English courts applied German law.

The other point of interest in the case is one which also arose incidentally in the case of *In re Askew*, and to which attention was called in the last number of the *Year Book* in a footnote on p. 186. This was a petition for a declaration of legitimacy under Section 2 of the Legitimacy Act, 1926. The Petitioner claimed that he was entitled under the provisions of Section 8 of the Act to be recognized as having been legitimated, on the ground that his parents had married after his birth, and his father was at the time of the marriage domiciled in Germany, and under German law he would have become legitimated. As at the time of his birth his father was married to a person other than his mother, the question was whether the declaration could be granted to him in view of the provisions of Section 1 (2), which provides that "nothing in the Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born". As the Petitioner obtained the declaration for which he prayed, Bateson J. must have taken the view (which was suggested as a possible view in the footnote in the last number of the *Year Book* referred to above) that the provisions of Section 1 (2) do not apply to the cases under Section 8, where a person is in England and Wales to be recognized as having been legitimated by reason of the fact that his father was domiciled at the time of the marriage in a foreign country and such person had become legitimated under the law of that country, but only to the cases where a person claims to have been "rendered legitimate" under Section 1 (1), i.e. where the father was domiciled at the time of the marriage in England or Wales. Upon this view the words "nothing in this Act shall operate to legitimate" in Section 1 (2) are only intended to apply to legitimations under the law of this country (first made possible by this Act) and not to qualify the provisions of the Act relating to the recognition in England of legitimations under a foreign law of domicil.

The case of the *London* (8) is another authority on the practice of the English courts where the issue of *lis alibi pendens* is raised as a ground for staying the proceedings in England. Where proceedings are commenced in Scotland by *A* against *B*, and subsequently *B* commences proceedings in respect of the same matter against *A* in England,¹ the proceedings in England can only be stayed on the ground that they were vexatious, and the fact that *B* had been made defendant in Scotland against his will is not sufficient to make it vexatious for him to institute proceedings in England.

This decision was in fact exactly the same as that in the case of the *Janera*² (reviewed in the *Year Book* for 1929 at pp. 248 and 258), except for the fact that in this case the other proceedings were in a court in another part of His Majesty's dominions and not in a foreign court. This case only shows that no distinction is to be drawn in the matter of *lis alibi pendens* between proceedings in courts in foreign countries and proceedings in other British courts.

The *Eskbridge* (9) decided a technical point which possesses some practical

¹ And the proceedings in England were proceedings which *B* had a right to bring, and not proceedings for the institution of which he required the leave of the court—as, for instance, in cases where leave to serve process out of the jurisdiction is necessary.

² [1928] P. 55.

importance. The High Court possesses Admiralty jurisdiction. The most characteristic and important feature of Admiralty jurisdiction in English law is the institution of proceedings by process *in rem*: this means that the process is commenced by a writ directed to the "owners of" certain property (for example a ship or certain cargo); this writ is served on the property in question, which thereby becomes seized under the proceedings, with the result that any judgment obtained by the plaintiffs can, if necessary, be enforced upon the property, which may be sold under an order of the court to satisfy the judgment.¹ The Admiralty procedure was made available for the claims of shipowners in respect of the carriage of cargo in their ships (with the result that they could institute proceedings by writs *in rem* against the cargo) in 1920, and the relevant statutory provision is now Section 22 of the Judicature Act 1925, but under this section this remedy is only open to shipowners domiciled abroad, who are thus given a privilege in the English courts which English shipowners do not share.

The *Adriatic* (10) was a case dealing with the question what law must be applied to determine the rights of the parties under a contract into which they had entered. This is a question which the parties are free to settle for themselves, if they choose to do so, by an express provision in their contract. If they do not do so, the court has to determine, in the light of the facts of the case and previous decisions on similar facts, what is the law which they must be presumed to have meant to apply for this purpose. In the case in question the principal difficulty was to choose between Egyptian law as the *lex loci contractus* and English law as the *lex loci solutionis*, and the fact that the contract and all the relevant documents were in English and used English legal terms and standard forms was regarded as an important factor in favour of the *lex loci solutionis*.

The case of *Allgemeine Versicherungsgesellschaft Helvetia v. The Administrator of German Property* (11) is a complicated case upon the interpretation of Section 6 of the Trading with the Enemy (Amendment) Act, 1914, a section which provided that, if during the war an enemy assigned a chose in action to another person, the assignee should not acquire any right to sue in respect of the chose in action which had been assigned, and that any person who made a payment to the assignee to satisfy such chose in action would be guilty of the offence of trading with the enemy. It was here decided that where the property of an enemy, which was insured with a neutral insurance company against war risks, had been brought to an English port under the Reprisals Order in Council, 1915, and seized as being the property of an enemy and placed in the custody of the Marshal of the Prize Court in accordance with that Order, and the enemy owner abandoned the property to the neutral insurance company, and that company accepted the abandonment and paid the enemy owner as for a total loss, this transaction was the assignment of a chose in action within the meaning of the section, and consequently the neutral insurance company acquired thereby no right to sue in respect of the property, and the property or its proceeds remained enemy property so as to come under the charge created by the Treaty of Peace.

1. *Civilian War Rights Association v. The King*. 46 T.L.R. 581 (Roche J.), 47 T.L.R. 102 (C.A.), [1932] A.C. 14 (H. of L.).

The suppliants were a company formed to obtain compensation for civilians who had suffered loss or damage in person or property from German air raids, bombardment, sinking of ships, and other causes during the war, 1914-18, and were assignees of the

¹ Cp. the case of the *Jupiter* No. 1, [1924] P. 236. *Year Book*, 1926, at pp. 213 and 216.

claims of a large number of individual claimants who had suffered damage from these causes. The suppliants brought a Petition of Right and claimed:

(1) That, even if the making of a treaty was a high prerogative act in respect of which the Crown could not act as trustee or agent for any British subject, the prerogative did not extend to the distribution of moneys received under a treaty, however received and in whatever circumstances;

(2) That Ministers of the Crown had, by statements made in reply to various deputations in 1916, 1917, and 1919, led the claimants to believe that money would be obtained from Germany to compensate them;

(3) That the claimants had by Royal Proclamation of September 1916 been invited to register and had registered their claims for such damage with the Foreign Claims Office, and again in April 1920 with the Reparation Claims Office;

(4) That at the end of the war the Treaty of Versailles was concluded, which contained the following articles:—

“Article 231. The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.

“Article 232. The Allied and Associated Governments recognize that the resources of Germany are not adequate, after taking into account permanent diminutions of such resources which will result from other provisions of the present Treaty, to make complete reparation for all such loss and damage.

“The Allied and Associated Governments, however, require, and Germany undertakes that she will make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each as an Allied or Associated Power against Germany by such aggression by land, by sea, and from the air, and in general all damage as defined in Annex 1 hereto.

“Article 233. The amount of the above damage for which compensation is to be made by Germany shall be determined by an Inter-Allied Commission, to be called the Reparation Commission, and constituted in the form and with the powers set forth hereunder and in Annexes II to VII inclusive hereto.

“This Commission shall consider the claims and give to the German Government a just opportunity to be heard.

“The findings of the Commission as to the amount of damage defined as above shall be concluded and notified to the German Government on or before May 1, 1921, as representing the extent of that Government's obligations.”

(5) That the damage to the claimants was included in the total claims against Germany submitted to the Reparation Commission by the Crown and in the assessment of the claims of this country against Germany notified by the Commission to the German Government;

(6) That the Crown had received from Germany payments under the Treaty of Versailles (including payments in respect of the sums due under Articles 231 and 232) and that Germany had made these payments on the understanding that these claimants would be paid out of these moneys, and under Articles 231, 232, and 233 of the Treaty of Versailles the claims of the claimants were made a prior charge on reparations;

(7) That His Majesty's prerogative in the making and execution of the Treaty of Versailles was limited to the performance of provisions of the Treaty, and the moneys received from Germany (or part thereof) were moneys held and received for and on behalf of the claimants who were the persons referred to in Article 232, and the Crown held the moneys as agent or trustee for the claimants;

(8) That the suppliant company was entitled to payment of the amounts of the claims by the Crown out of the moneys received by the Crown from Germany under the Treaty, or alternatively to a rateable proportion of the moneys so received on account of reparations.

In support of the contention that the Crown could be a trustee or agent of individual claimants in respect of moneys received under a treaty in payment of private claims, the suppliants relied on the Clearing House provisions of the Treaty, under which debts due to English creditors by German debtors were recovered through the machinery of

the Clearing House, and, after the deduction of a commission of $2\frac{1}{2}$ per cent. for collection, the amounts collected were paid to the English creditors.

The Crown demurred to the Petition and contended it disclosed no cause of action.¹

Held by Roche J.:

(1) That it was a general principle of English law that, in all that related to the making and performance of a treaty with another sovereign, the Crown was acting under its prerogative, and could not be an agent or trustee for any person whatsoever. It was not possible to distinguish the position of the Crown in making the treaty and in disposing of the proceeds of the treaty (*Rustomjee v. The Queen*, 1 Q.B.D. 487; 2 Q.B.D. 69 (C.A.);

(2) That, under this principle, the Crown, in concluding the Treaty of Versailles and in carrying it out and in receiving payments from Germany under it, did not act as agent or trustee for any individual British subjects, and did not hold any moneys received by it as agent or trustee, whatever might be the grounds on which the payments had been claimed from Germany, or the provisions of the Treaty under which the payments were made;

(3) That this principle applied except in so far as the position was altered in any particular case by Act of Parliament, or Orders or Regulations made under the authority of any Act of Parliament (*Baron de Bode v. the Queen*, 13 Q.B. 364; 3 H.L.C. 449);

(4) That the provisions of the Treaty were not conclusive or even indicative of the relations between the Crown and British subjects;²

(5) That, though the relations of the Crown and individual British creditors, in respect of debts recovered through the Ex-Enemy Debts Clearing House, were governed by the provisions of the Treaty of Peace Act, 1920, and Orders in Council made thereunder, in a manner which might create an exception to the general principle stated above, there was no Act or Statutory Order which applied to the claims of the suppliants, or the moneys recovered from Germany in respect of their claims so as to prevent the application of the general Common Law principle;

(6) That, consequently the Crown held the moneys recovered from Germany under the Peace Treaty under its prerogative and was under a duty to administer such moneys according to the advice of its ministers; the administration of such money was a matter for Parliament, and not for courts of law; and the suppliants could not establish any claim to such moneys enforceable in a court of law;

(7) That, on these grounds, the Crown's demurrer must be allowed.

On appeal, the Court of Appeal decided in favour of the respondent on substantially the same grounds as Roche J. had allowed the demurrer, and on appeal to the House of Lords the appeal was again dismissed on substantially the same grounds.

Lord Buckmaster held *inter alia*:

(1) That there was no evidence whatever of any acceptance of trusteeship or agency by the Crown;

(2) That the persons whose claims were made were not considered by Germany in making the payment at all. The terms of the Treaty were that Germany should pay the sum necessary to satisfy the claims of various people, and it was left to the governments themselves, as between them and their nationals, to determine how the money was to be distributed;

(3) That Lush J. in *Rustomjee's* case had stated the legal position accurately, in circumstances analogous to the present case, in the following words: "It seems to me that the relation, which is pressed upon us here, never existed in this case between the Crown and the subject, and is one which cannot exist in any state like ours between

¹ Consequently, the merits of the claim were not relevant in these proceedings. It was, however, stated by the Attorney-General that Germany was not able to discharge her liabilities under the Treaty in full. The total Civilian War Claims against Germany were £45,000,000. Of the moneys received from Germany under the Treaty, £5,000,000 was distributed among civilian claimants (including £1,250,000 to the individuals who had assigned their claims to the suppliants), which was a much larger sum than their proportionate share.

² Though, if it were relevant, he was of the opinion that the contention that Articles 231, 232, and 233 of the Treaty of Versailles made the claims of the suppliants a prior charge on reparations did not appear to be well founded.

the sovereign and the subject. . . . No doubt a duty arose, as soon as the money was received, to distribute the money amongst the persons towards whose losses it was paid by the Emperor of China; but then the distribution when made would be, not the act of an agent accounting to a principal, but the act of the sovereign in dispensing justice to her subjects. For any omission of that duty, the sovereign cannot be held responsible. The responsibility would rest with the advisers of the Crown, and they are responsible to Parliament and to Parliament alone."

2. *The King v. Corrigan*. [1931] 1 K.B. 527 (C.C.A.), 47 T.L.R. 27.

On October 21, 1929, a London magistrate issued a warrant for the arrest of C., a British subject, ordering that he should be brought before the Court to answer an information laid by two persons, X. and Y., alleging that C. had obtained from one of them £4,900 by false pretences and with intent to defraud.

C. was then in France. A request for his extradition was made by the Government of the United Kingdom to the French Government under the Extradition Treaty of August 14, 1876, and C. was arrested in Paris on November 13, 1929. C. was taken before a French court where the charge against him of obtaining money by false pretences was made known to him. C., through his counsel, informed the French court that he did not object to being returned to England to answer this charge.

On November 18 two further warrants were issued by the London magistrate for the arrest of C. in connexion with (a) an information laid by Mrs. H., alleging that C. had obtained from her sums of £800 and £3,000 by false pretences; (b) an information laid by N., alleging that C. had obtained from him eight sums, ranging between £100 and £6,000, by false pretences, and his extradition on these charges was also requested of the French Government. C., who had been detained in custody in France, was again brought before the French court, and informed of these charges of obtaining money by false pretences, and again, in the case of these charges he declared his willingness to be returned to England to be tried upon them.

C. was brought from Paris in custody to Boulogne, and handed over to the English police on the boat and brought to England. The French Government informed the British Embassy in Paris that C. had been shown the three charges against him, and consented to be sent back "without the fulfilment or accomplishment of the formalities of extradition".

On his arrival in England, C. was committed for trial at the Central Criminal Court on these three charges.

When the case was tried, C. was charged under two indictments:

- (1) charging him, under Section 20 of the Larceny Act, 1916, with the fraudulent conversion of sums of money entrusted to him by (a) X. and Y., (b) Mrs. H., and (c) N.
- (2) charging him, under Section 32 of the Larceny Act, 1916, with obtaining by false pretences sums of money from (a) X. and Y., (b) Mrs. H., and (c) N.

The second indictment was based upon the same charges as those shown to C. during the proceedings in the French court, and the first indictment charged him with a different and more serious offence (fraudulent conversion) but one based upon the same set of facts.

C. was convicted at the Central Criminal Court upon the first indictment (fraudulent conversion) upon the counts relating to sums of money entrusted to him by (b) Mrs. H., and (c) N., and acquitted on the counts relating to the moneys of (a) X. and Y.

The second indictment (false pretences) was not proceeded with in view of the conviction on the first indictment.

C. appealed to the Court of Criminal Appeal against his conviction on the ground (*inter alia*) that the Central Criminal Court had no jurisdiction to try him on the indictment for "fraudulent conversion". This contention was based on the following grounds:

(1) That he had been extradited from France under the Treaty of 1876 on charges of obtaining money by false pretences;

(2) That Article 4 of that Treaty provided that "a person surrendered shall not be tried for any crime or offence committed in the other country before the extradition, other than the crime for which surrender has been granted";

(3) That, though Section 19 of the Extradition Act, 1870, only provided that, where

a person has been surrendered under an extradition treaty he "shall not, until he has been restored or had an opportunity of returning to the foreign state, be triable or tried for any offence committed prior to the surrender . . . other than such of the said crimes as may be proved by the facts on which the surrender was granted", nevertheless the Act only became applicable to France by reason of an Order in Council made under Sections 2 and 5 of the Act, and power was given under those Sections to restrict by Order in Council the application of the Act and to render its application subject to such "conditions, exceptions and qualifications as may be deemed expedient", and the Order in Council dated May 1878, which applied the Act to France, recited the provisions of the Treaty (including Article 4), and accordingly rendered the application of the Act subject to the conditions or qualifications of Article 4 of the Treaty, and therefore restricted the jurisdiction of the Court to try C. for any crime or offence other than the crime of obtaining money by false pretences, on which he had been surrendered, even if the charges of "fraudulent conversion", being based on the same facts, might be charges on which there would have been jurisdiction to try him under Section 19 of the Act, if the scope of that Section had not been cut down by the Order in Council.

On behalf of the Crown it was contended:

(1) That C. had not been surrendered or extradited in that he consented to be returned to England, and by his waiver relieved the French court of the necessity of making any order for his surrender under the Treaty. If he had been surrendered under French law, a formal order from the President of the French Republic would have been necessary. Since there was no surrender, neither Section 19 of the Act, nor Article 4 of the Treaty applied to the case;

(2) That even if it was a surrender, Article 4 of the Treaty had, and was intended to have, the same meaning as Section 19 of the Act. The article referred, by the words "crime or offence", not to the manner in which the charge was formulated in accordance with the law of one or other country, but to the substance of the allegations—the state of facts on which the extradition was granted.

Held by the Court of Criminal Appeal:

(1) (by a majority) that C. had not been extradited under the Treaty, and that therefore neither Article 4 of the Treaty nor Section 19 of the Act applied to the case;

(2) That Article 4 of the Treaty did not have the effect of limiting the power given by Section 19 of the Act to try a surrendered person upon any charge based upon the facts contained in the depositions and information, upon which his surrender had been obtained.

3. *Kossekechatko v. Attorney-General for Trinidad*. [1932] A.C. 78 (P.C.).

On August 7, 1930, a party of 9 men landed in a small boat at Chatham in the island of Trinidad. They declared that they had come from the French penal settlement at Cayenne, French Guiana. They were immediately arrested and brought before a magistrate under an Ordinance of the Colony called the French Guiana Extradition Ordinance. This ordinance provided (a) for the arrest of persons believed to be fugitives from French Guiana, and (b) for the detention in custody (for not more than three months) until the pleasure of the Governor of Trinidad was known, upon the order of a magistrate, of any person whom such magistrate considered to be a "fugitive criminal" from French Guiana. The magistrate made an order for their detention. Subsequently the Governor of French Guiana made a requisition to the Government of Trinidad for the extradition of eight of these men under the Extradition Treaty of 1876, between the United Kingdom and France, on the ground that they were persons who had been convicted in France of crimes to which the said treaty applied. The Extradition Treaty applied to "persons who are being proceeded against, or who have been convicted of a crime committed in the territory of one Party, and who shall be found in the territory of the other, in the circumstances and conditions stated in the present Treaty (Article 1)." Subject to certain special provisions, which will be referred to hereafter as far as they are material, extradition in Trinidad is governed by the provisions of the Extradition Act, 1870, which provides for the arrest, and for the surrender to a foreign state of "fugitive criminals of such state"—an expression which is defined in Section 26 of the Act as "any person accused or convicted of an extradition crime committed

within the jurisdiction of that foreign state, who is . . . in some part of His Majesty's dominions".

Upon receipt of this requisition the Governor of Trinidad, acting under the powers vested in him by the Extradition Act, the Orders in Council applying that Act to Trinidad, and also under the French Guiana Extradition Ordinance, ordered the magistrate to issue his warrant for the apprehension of these eight men, and upon this warrant they were brought before the magistrate to show cause why they should not be surrendered under the Extradition Act to the Government of French Guiana.

Evidence of convictions in France on different crimes was produced in the case of each of the fugitives, but there was no evidence that the crimes, on which the convictions were based, were committed in France.

The magistrate, however, made an order for their extradition as "fugitive criminals". The prisoners were, as required by Section 11 of the Extradition Act, given 15 days in which they might, if they desired, apply for a writ of *habeas corpus* in order to secure their release, if they could obtain a decision from the Supreme Court upon such writ that the order for their extradition was wrong.¹

The Appellants in this case, three of the eight men, applied for writs of *habeas corpus*, which were granted, and upon the return to the writs the Supreme Court of Trinidad discharged the writs, holding that the order for their extradition was proper and lawful.

From this judgment of the Supreme Court the present appeal to the Privy Council was brought.

The Appellants contended (*inter alia*) that the order for their extradition was bad, in that there was no evidence before the magistrate that the crimes of which the Appellants had been convicted were committed in French territory, and, under French law, French nationals could be tried in France in respect of crimes committed elsewhere; that if there was no evidence that the convictions were in respect of crimes committed in French territory, there was no evidence that the Appellants were "fugitive criminals from France" within the meaning of the Extradition Act, or the Trinidad ordinances, or that they were persons who should be surrendered under Article 1 of the Treaty of 1876.

It was contended on behalf of the Attorney-General for Trinidad that:

(1) the meaning of Article 1 of the treaty was that in the case of convicted persons the article applied to all convictions in the territory of the other party, and

(2) under the Extradition Act, if a conviction in French territory was proved, the onus was on the convicted person to prove that the conviction was not in respect of a crime committed in French territory.

Held by the Privy Council:

(1) That from the language of the treaty (Article 1) it was clear that, even in the case of convicted persons, the treaty only applied to crimes committed in the territory of the state applying for extradition;

(2) That, in view of the evidence of French law, which showed that a person might be convicted in French territory in respect of crimes committed elsewhere, a conviction by a French court was not *prima facie* evidence of a crime committed in French territory, which cast the onus on the Appellants to prove that the convictions were in respect of crimes committed elsewhere;

(3) That, therefore, as the French authorities had failed to supply on this point the evidence necessary to justify an order for extradition, the Appellants must be discharged from custody and the order of the Supreme Court of Trinidad on the return to the writ of *habeas corpus* must be reversed.

4. *Inverclyde v. Inverclyde*. [1931] P. 29.

This was a petition by a woman for a decree of nullity of marriage on the ground of the impotence of the Respondent. The Respondent took out a summons for the dis-

¹ It was also the case that the wrong order was made by a magistrate at this stage in the proceedings. This was one of the points raised in the appeal; but it is not a point of any general interest.

missal of the petition on the ground that the English courts had no jurisdiction to entertain it.

The parties were married in London on August 1, 1930. Both parties were domiciled in Scotland. The Petitioner was resident in England, and the Respondent had places of residence in Scotland and in England.

The Respondent contended that, by reason of the fact that both parties were domiciled in Scotland, the Scottish courts had exclusive jurisdiction to entertain this petition.

He contended:

(1) that in cases where a decree of nullity was sought by a petitioner who claimed that the marriage was void (a) on the ground that the proper formalities had not been fulfilled, or (b) on the ground that one of the parties did not possess the capacity to contract the marriage, the courts either of the country of the domicile or of the country in which the marriage was celebrated might have jurisdiction to entertain it;

(2) in cases where a decree of nullity was sought on the ground of impotence, the question was whether a voidable marriage should be declared void, and (as in the analogous case of a petition for divorce) the courts of the domicile had exclusive jurisdiction.

The Petitioner contended that the English courts had jurisdiction:

(a) on the ground that the marriage was celebrated in England;

(b) on the ground that the parties were resident in England; and that there was no good ground for making any distinction, as regards jurisdiction, between petitions based on impotence or based on informality of celebration or want of capacity.

Held by Bateson J.:

(1) That a decree of nullity on the ground of impotence was a decree putting an end to a marriage which was a good marriage until the making of the decree;

(2) Such a decree therefore was a judgment *in rem*, affecting and altering status;

(3) Consequently the decree of the courts of the domicile had exclusive jurisdiction to pronounce;

(4) That therefore the petition must be dismissed.

5. *De Massa v. de Massa*. (*The Times*, March 31, 1931.)

The Petitioner, a woman of French nationality and domicile, went through a form of marriage with the Respondent, a man also of French nationality and domicile, on July 29, 1927, at a registry office in London. At that date the Petitioner was 18 years old. After a short period of residence in London with the Respondent, the Petitioner returned to France and had not since seen the Respondent.

On July 4, 1930, the Petitioner obtained from a French court a decree annulling the marriage on the ground that the Petitioner had not obtained the consent of her father to the marriage, and that without such consent she was incapable of contracting a valid marriage.

The Petitioner now sought a decree of nullity from the English courts.

The President (Lord Merrivale) granted a decree *nisi*. "A French court of competent jurisdiction had annulled the marriage", and therefore he declared it to be null and void.

6. *Lendrum v. Chakravati*. (1929), *Scots Law Times Reports*, 96.

The Pursuer, F. H. L., a girl of 18 years of age and daughter of a Scottish minister of Glasgow, married in a church in Glasgow in 1918 the Defender, C., a Hindu domiciled in British India. It was the common intention of the parties that at the end of the war the Pursuer should go to India with the Defender as his wife where they would reside. In 1919 the Defender left for India and settled there. Later in the same year the Pursuer followed him and lived with him in India. In 1922 she returned to Scotland in disgust at the conditions of her life in India and remained there till 1924. In 1924 she returned to the Defender but left him again in 1925 and came back to the United Kingdom. In 1928 she commenced in the Scottish courts the suit for a declarator of the nullity of her marriage with C.

The issue of jurisdiction was decided first and it was held by Lord Morrison (Lord Ordinary):

(1) That although the nullity of the marriage was in issue, a woman, who has gone

through a ceremony of marriage with a man and then lives with him on the assumption that she is validly married to him, acquires by her residence with him *de facto* a domicile in the place where his domicile is;

(2) That C. was domiciled in British India and F. H. L. had acquired a domicile in India;

(3) That nevertheless, in a suit for a declarator of nullity of marriage, the courts of the country in which the marriage was celebrated had jurisdiction as well as the courts of the country of the domicile and consequently the suit was one which the Scottish courts could entertain. (The decision of the House of Lords in the *Salvesen* case was not cited to the Lord Ordinary, and Lord Mackay, in his judgment on the merits, referred to this case, but thought (a) it was not for him to interfere with the decision of Lord Morrison on this point except on very cogent grounds; (b) that the speech of Lord Haldane in the *Salvesen* case "left open a somewhat narrow platform for the *forum loci celebrationis*".)

On the merits of the case it was contended on behalf of the Pursuer (the Defender was not represented):

(1) That the marriage was void because the Pursuer had been induced to enter into the marriage by the fraud of C. in that he had represented falsely and fraudulently "that he was a Brahmo; that a Brahmo was not a Hindu; that a Brahmo was not allowed by his law to take more than one wife; that a Brahmo, in matters of marriage, was substantially in the position of a Christian, being (a) monogamous, and (b) unitarian; that by a certain Act, described as the Brahmo Marriage Act, he was entitled to marry the Pursuer; and that she would be his proper wedded wife", which representations were false in that (a) C. was able to have more than one wife in India if (which it was open to him to do) he reverted to Hinduism, and (b) his marriage with the Pursuer was not recognized in India;

(2) That C. was a person, whose personal law permitted polygamy and in consequence the marriage of 1918 (and any marriage with him wherever and however celebrated) was a polygamous marriage, and (b) that the Pursuer was incapable of entering into a polygamous marriage by her personal law and consequently the marriage was void;

(3) That the marriage was void because C. was incapable by the law of the domicile of contracting a marriage with the Pursuer or conferring on her the status of a lawful wife, and/or of contracting a marriage in the manner in which this marriage was celebrated, and in order that a marriage should be valid, it must be one which both parties are by their personal law capable of contracting;

(4) That there was no *consensus ad idem*, as the Pursuer intended and thought that in entering into this marriage with C. she would acquire the legal status of the wife of C. in India, but under his personal law C. was incapable of contracting a valid marriage with the Pursuer and conferring upon her the status of a lawful wife in India.

Held by Lord Mackay:

(1) That the Pursuer's first contention must be rejected on the grounds (a) that fraudulent misrepresentation on the part of C. was not established, (b) that, even if it had been established, the misrepresentations would not avoid the marriage, since misrepresentations with regard to the social condition, legal condition, or means of a party do not constitute a ground for nullity of marriage;

(2) That the Pursuer's second contention (i.e. that the marriage celebrated in 1918 was a polygamous marriage and void) must be rejected. He said that this contention would mean "as I understand it, that any person to whom, according to his system of personal law, it may be open, without crime and without religious offence, to take a second wife, is *eo facto* precluded from entering into any marriage union, not merely with all Christian persons, but with all persons who live under a system of law where monogamy is enforced. So put, I should think that hundreds and thousands of unions at present regarded as binding would be shaken. It would, I think, be directly in the teeth of the decision in the English Court of Appeal in *Rex v. Superintendent Registrar of Marriages, Hammersmith*, [1917] 1 K.B. 634", and he went on "The true way of looking at the matter appears to me to be this: Although by the law affecting one of the parties to a contract of monogamous marriage he may, without offence to his own system of general law, be entitled to take a second wife, yet, if the contracted marriage is his first and if he uses words and so contracts as to leave no doubt that he binds himself

towards his spouse to live monogamously, then his taking any second woman to wife, while not rendering him amenable to penal laws in his domicile, is undoubtedly an infringement of the contract of monogamy into which he has entered and of the marital rights of his wife under that contract, and accordingly would afford her a remedy in any competent Court where such a breach was recognized as inferring dissolution. There arises at once a dilemma, but a very simple dilemma, to solve. If the contract between these two parties was one which recognized the defender's right to enter into subsequent and co-incident marriage, then it was not a Christian marriage or a monogamous one, and it would offend the law of capacity of the wife. She could not entertain such a contract. If, on the other hand, it clearly limited the parties, by vows of fidelity on each side, to the one and only wife and one and only husband, then it was a monogamous and valid Christian marriage, for there is no juridical difficulty in the concept that a person by such a contract debars himself from some part of the liberties legally allowed to him by his own system of law. Although this was not fully argued out in the *Hammersmith* case, it appears perfectly certain that it is involved because the Court unanimously held that in the case of the marriage of a Mohamedan man his first marriage to an English and Christian woman was a valid impediment which justified the Registrar in not issuing the document entitling him to marry a second person; that is to say, they affirmed positively the validity of his first marriage, their eyes being perfectly open to the fact that his personal law permitted him four wives."

(3) The Pursuer's third contention must be rejected on the grounds:

that though (a) the law of Scotland was that the capacity of each party to enter into a marriage was governed by the law of his domicile and, in order that the marriage should be valid, the parties must be capable both by the law of their respective domicils and by the *lex loci celebrationis*,¹ and though (b) the evidence of the law of India was to the effect that no marriage between a Hindu and any person not a Hindu would be recognized as valid in India whether celebrated in India or elsewhere, and C. was a Hindu domiciled in India; nevertheless (c) this provision of the (Hindu) law of India was not a provision relating to the *capacity* of a Hindu domiciled in India but in the nature of a prohibition against mixed marriages of Hindus and was not one whose extraterritorial operation was recognized under private international law.²

(4) That the Pursuer's fourth contention was a valid one, as the error of the Pursuer was one induced by C. and was one "*in substantialibus*" and on this ground a decree of nullity should be pronounced.

7. *Collins v. The Attorney-General*. 47 T.L.R. 484.

A petition was presented on behalf of C., an infant born in Germany in May 1927, under Section 2 of the Legitimacy Act, 1926, and Section 188 of the Judicature Act, 1925, praying for a declaration that C. should be recognized as having been legitimated under the provisions of Section 8 of the Act of 1926 by reason of the marriage of his father and mother in January 1929 and as from the date of that marriage. The facts were as follows:

X., the father of C., was a British subject, and was in 1912 married to Y. C. was born

¹ Lord Mackay said the rule [Exception No. 1] in Dicey's *Conflict of Laws*, 4th ed., p. 708: "The validity of a marriage celebrated in England between persons of whom one has an English and the other a foreign domicile is not affected by any incapacity which though existing under the law of such foreign domicile does not exist in English law", is not a rule of Scottish if it is a rule of English law. But *quaere* whether, in view of the fact that it is based upon the cases of *Simonin v. Mallac*, *Sottomayer v. de Barros*, No. 2, and *Ogden v. Ogden*, and that these cases have been adversely commented upon by the Privy Council and the House of Lords in *Attorney-General of Alberta v. Cook* and the *Salvesen* case, this rule is any longer a rule of English law.

² Lord Mackay thus reaches, by a slightly different process of reasoning, the same results as the English courts in *Chetti v. Chetti*, a result which is stated in Dicey (Exception No. 2, *Conflict of Laws*, 4th ed., p. 709) as follows: "A marriage celebrated in England is not invalid on account of any incapacity which, though imposed by the law of the domicile of either or both of the parties, is of a kind to which our courts refuse recognition."

in 1927 of the illicit union of X. and Z., an unmarried woman. At the time of C.'s birth the marriage of X. and Y. had not been dissolved, but this marriage was finally dissolved by a decree of November 1928 of the High Court of Hamburg, Germany. X. married Z. in January 1929. At all material times X. was domiciled in Hamburg. Section 8 of the Act of 1926 provides:

"Where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, and the father of the illegitimate person was or is, at the time of the marriage, domiciled in a country other than England or Wales, by the law of which the illegitimate person became legitimated by virtue of such subsequent marriage, that person, if living, shall in England and Wales be recognized as having been so legitimated from the commencement of this Act or from the date of the marriage, whichever last happens, notwithstanding that his father was not at the time of the birth of such person domiciled in a country in which legitimation by subsequent marriage was permitted by law"; and Section 1 (2) of the Act contains the following provision:

"Nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born".

It was contended on behalf of the Petitioner:

(1) That X. being domiciled in Germany at the time of his marriage with Z., the question whether C. was to be recognized in England as legitimated under Section 8 of the Act of 1926 depended on whether C. had become legitimated under German law;

(2) That Section 8 of the Act of 1926, in referring to the law of the domicile (in the present case German law), meant the whole of German law including the rules of private international law applied by the German courts and that consequently the case must be decided by applying that municipal law which the German courts, as the courts of the domicile, would apply in the circumstances;

(3) (on the evidence of German law) that, under the rules of private international law applied by the German courts, the question of the legitimation of C. by reason of the marriage of his parents was governed by English law, as the law of the nationality of his father X., including the rules of private international law applied by the English courts, but that in the event of its being found, as in the present case, that English law referred the question back to German law, the German courts applied German internal law to determine the question, and under German internal law C. would be regarded as legitimated by reason of the marriage of his parents, although his father was married to Y., a third person, at the time of C.'s birth;

(4) That consequently C. was a person, who was under Section 8 to be "recognized as legitimated" as from the date of the marriage of his parents which was subsequent to the Act;

(5) That Section 1 (2) of the Act only applied to prevent the legitimation of persons who (otherwise) would have been "rendered legitimate" under Section 1 (1) of the Act, although one of their parents was married to a third person at the time of the birth; section 1 (1) dealt with persons whose fathers were domiciled in England and Wales and who were in the clearest sense persons legitimated by the Act. Section 1 (2) did not affect the cases under Section 8 (1) which dealt with the "recognition in England and Wales" of persons as having been legitimated under a foreign law of the domicile, persons who are described in Section 8 (2) as "persons recognized as having been legitimated under this Section", not as persons rendered legitimate by the Act;

(6) Under Section 2 of the Act, any person "claiming that he . . . has become a legitimated person" is entitled to present a petition for a declaration of legitimacy and under Section 8 (2) all the provisions of the Act relating to "legitimated persons" are made to apply to "persons recognized as having been legitimated under Section 8" but the expression "legitimated person" is not used in Section 1 (2);

(7) That consequently C. was entitled to a declaration of legitimacy under Section 2. Bateson J. made a declaration accordingly.

8. *The "London"*. [1931] P. 14.

In October 1930 a collision occurred in Scottish waters between the steamships *Grandi* and *London*. The owners of the *London* commenced proceedings *in personam* in the Scottish courts against the owners of the *Grandi*. Subsequently the owners of the *Grandi* commenced proceedings *in rem* in the English courts against the owners of

the *London*. The owners of the *London*, as Defendants in the proceedings in England, took out a summons to have the proceedings in England stayed, and contended that, when proceedings were brought in the English courts in respect of a matter which was already the subject of proceedings in a court of concurrent jurisdiction in the United Kingdom or any other part of H.M. dominions, the English courts would as a matter of course stay the proceedings in England whether the plaintiff in England was the plaintiff or defendant in the other proceedings.

Held by Langton J.:

(1) That the jurisdiction to stay the proceedings in England was a discretionary one and must be based on the ground that these proceedings were vexatious;

(2) That, where as in the present case, the proceedings in England were proceedings which the Plaintiff in England had the right to bring, a clear case had to be established before the discretionary power to stay could be exercised;

(3) The Plaintiff in these proceedings was in no way responsible for the institution of the proceedings in Scotland in which he was defendant against his will, and consequently it was not possible to hold that it was vexatious of him to institute proceedings in England merely on account of the existence of the proceedings in Scotland;

(4) For these reasons the Defendant's application to stay the proceedings in England must be rejected.

9. *The Eskbridge*. [1931] P. 51.

The Plaintiffs were a company registered in England and owned the s.s. *Eskbridge* which had carried from Leningrad to Hull a cargo of grain, consigned to the R. B. G. Export Company. Neither the consignees nor their assigns had received bills of lading when the cargo arrived, and consequently they were not in a position to take delivery, and the Plaintiffs caused the cargo to be unloaded and stored. The Plaintiffs received on November 26, 1931, a cheque for £3,200 for freight and insurance in respect of this cargo, but declined to release the cargo, as they claimed a larger sum. On November 27, 1931, the R. B. G. Export Company issued a writ against the Plaintiffs, claiming the return of the £3,200, and on December 2 the Plaintiffs issued a writ *in rem* in the Admiralty Division of the High Court against the "owners of the cargo of wheat" in question, claiming the balance in excess of £3,200 which they declared to be due to them: the Defendants were the holders of the bills of lading in respect of the cargo, which had arrived in the meantime, and therefore "the owners" of the cargo in question. The Defendants entered an appearance under protest and moved for an order to set aside the writ with costs on the ground that under Section 22 of the Judicature Act, 1925, it was only open to shipowners domiciled abroad to bring actions *in rem* against cargo in the Admiralty Division in respect of freight, and the Plaintiffs were "domiciled" in England.

Held by Lord Merrivale, P.:

(1) That Section 22 of the Judicature Act, 1925, gave to the High Court Admiralty jurisdiction in respect of claims relating to the carriage of goods in a ship "unless it is shown . . . that the owners . . . of the ship were domiciled in England".

(2) That the High Court had no Admiralty jurisdiction in respect of claims by shipowners in respect of the carriage of goods other than that conferred on it by this section;

(3) That the Plaintiff company was domiciled in England and that therefore the Court had no jurisdiction to entertain an Admiralty action instituted by them and the writ must be set aside with costs.

10. *The Adriatic*. [1931] P. 241.

The Plaintiffs were a firm consisting of two partners, a Scotsman and a Hungarian, and carried on business in Egypt, with a principal office at Alexandria. The Defendants were a company carrying on business in London, with a branch office at Alexandria.

On July 9, 1929, a freight engagement note, drawn up in English, was entered into between the Plaintiffs and the Defendants, under which the Plaintiffs undertook to reserve room in a vessel, to be specified later, for the shipment of a consignment of cotton seed from Alexandria to London. The Plaintiffs chartered the Swedish vessel *Adriatic*, under a charter party drawn up in English, for the purpose of fulfilling this, and other

engagements, and issued on October 11, 1929, to the Defendants bills of lading "as agents only" of the shipowners for the carriage of the cotton seed on this vessel to London, and for its delivery there to the Defendants' order on payment of the freight. The bills of lading were in English and were in a standard form approved by the London Corn Trade Association. On the voyage, as the result of a collision, the *Adriatic* had to put in at Cadiz and became a constructive total loss. The cotton seed was unloaded at Cadiz and delivery of it was taken there by the Defendants.

The Plaintiffs, on behalf of the shipowners, claimed distance (i.e. *pro rata*) freight for the carriage from Alexandria to Cadiz.

The Defendants contended that the contract between the parties was a contract governed by English law as being (1) the law which the circumstances of the case indicated as that intended by the parties to govern the contract, and (2) the *lex loci solutionis*, and it was admitted that if this contention was correct the claim for distance freight could not be sustained, as such a claim was unknown to English law. The Plaintiffs contended that the contract between the parties was governed (a) by Swedish law as the law of the flag of the vessel, or alternatively (b) by Egyptian law the *lex loci contractus*. The question which law governed the contract was tried as a preliminary point.

Held by Langton J.:

(1) That in the absence of an express provision in the contract, the law to be applied to determine the rights of the parties under the contract was that law which under all the circumstances of the case the parties must be presumed to have intended to govern their contract, the presumed intention of the parties being deduced in the light of the authority of decided cases in similar circumstances;

(2) Under the authorities, in the case of contracts of affreightment (as this was), the parties were presumed to have intended the law of the flag to apply in the absence of circumstances indicating a contrary intention;

(3) The fact, however, that the contract between the Plaintiffs and the Defendants did not specify any particular ship, nor that the vessel should be of any particular nationality, and that the Plaintiffs never informed the Defendants of the name or nationality of the ship selected by them to carry the cargo, did indicate that the parties could not have intended the nationality of the ship to be a material factor affecting the contract between them, and therefore that they did not intend the law of the flag to apply;

(4) That, as between Egyptian law (*lex loci contractus*) and English law (*the lex loci solutionis*), England being the place of delivery and payment, the fact that of the relevant documents on which the Plaintiffs relied, the charter party and the bills of lading were in English and in the standard English form, and the freight engagement note was also in English, and that such documents could most easily and conveniently be interpreted by an English court and in the light of English law, created a presumption that English law was that which the parties intended as the law to be applied for the ascertainment of their rights under their contract.

11. *Allgemeine Versicherungsgesellschaft Helvetia v. The Administrator of German Property*. [1931] I.K.B. 672 (C.A.).

G. Ehni & Co., a firm carrying on business in Germany, acting under the instructions of G. Welsch & Co., a firm carrying on business in Peru, purchased some diamonds and dispatched them in February 1916 to G. Welsch & Co., the packet being shipped in the name of a Dutch neutral in a Dutch vessel, the *Osterdijk*, sailing from Amsterdam. The diamonds were insured with the plaintiff company, an insurance company whose head office was in Switzerland, under a policy which carried war risks.

Under the Reprisals Order in Council, 1915, every merchant vessel, sailing from any port (other than a German port) having on board goods of enemy origin or which were enemy property, could be required to discharge such goods in a British port, and on February 17, 1916 the *Osterdijk* was compelled to discharge these diamonds at Kirkwall, which were then (as the Order provided) placed in the custody of the Marshal of the Prize Court and sold by him under an Order of the Court of February 11, 1918. At the hearing before the Prize Court the Dutch neutral, in whose name they were shipped, appeared and claimed the release of the diamonds, but the Court held that the goods were enemy property and he was only a "nominal shipper".

After the order of the Court for the sale, but before the sale took place, Ehni & Co. abandoned the diamonds to the plaintiff company and claimed to be paid by the plaintiff company under the insurance policy as for a total loss, and the plaintiff company accepted the abandonment and paid Ehni & Co. accordingly.

The sale of the diamonds actually took place on September 17, 1919. The proceeds of the sale were paid to the Marshal of the Prize Court, and later, by an Order of the Prize Court of April 1925, were transferred to the Custodian of Enemy Property, and subsequently to the Defendant, as being the property of a German national in the United Kingdom which came under the charge created by Article 297 of the Treaty of Versailles and the Treaty of Peace Order, 1919. Notice of the proceedings in the Prize Court in 1925 was given to the representative of the "nominal" Dutch shipper who had appeared as claimant in the proceedings in 1918, but he did not appear. The Court had no notice of the interests of the plaintiff company, and the plaintiff company was not summoned and did not appear.

The plaintiff company made no claim till July 1927, after the attention of Ehni & Co. had been called to this parcel of diamonds by the Administrator. The plaintiff company claimed that the diamonds had become their property by virtue of the abandonment by Ehni & Co. in June 1918, and that the property of a neutral (Swiss) company could not be charged under Article 297 of the Treaty and transferred to the Defendant under the Treaty of Peace Order in Council, and consequently they sued the Administrator to recover the proceeds of the sale.

The Defendant contended that the plaintiff company could not by virtue of the abandonment in June 1918 acquire any right to sue to recover the proceeds of these diamonds, because the diamonds or their proceeds were at all relevant times situated in the United Kingdom, and the firm, Ehni & Co., were an enemy firm, and Section 6 of the Trading with the Enemy (Amendment) Act, 1914, provided that no person should, by virtue of any assignment of any debt or chose in action made after the beginning of the war in his favour by an enemy, acquire any right to sue in respect of such debt or chose in action unless such assignment were made with the consent of the Board of Trade, and any person who paid or discharged any debt or chose in action to any person to whom it had been so assigned by an enemy was guilty of the offence of Trading with the Enemy, and the abandonment of the diamonds was an assignment, and the proceeds of their sale were a chose in action within the meaning of that section.

The plaintiff company contended that Section 6 of the Act did not apply to this transaction on the grounds:

(1) That the abandonment of insured property by the assured to the assurer was not an assignment;

(2) That what was transferred was the property in the diamonds themselves, and this was not a chose in action but property in goods;

(3) That the section did not apply to choses in action against the Crown.

Roche J. had given judgment for the plaintiff company and rejected the contention of the Defendant based upon Section 6 of the Act, on the third of the three grounds stated above.

On appeal to the Court of Appeal by the Defendant, the judgment of Roche J. was reversed and judgment entered for the Defendant.

Held by Scrutton L.J.:

(1) The powers of the Prize Court in respect of property discharged at a British port under the Reprisals Order in Council, 1915, were limited to "preserving the *res* for delivery to the persons who ultimately established a title" (the *Zamora*, [1916] 2 A.C. 77);

(2) That but for the provisions of Section 6 of the Trading with the Enemy (Amendment) Act, 1914, (a) a German subject whose property had been so seized, could transfer such property to a neutral before the Treaty of Peace Order, 1919, came into force, and such property would not then come under the charge created under Article 297 of the Treaty of Versailles (the *Oscar II*, [1921], 1 A.C. 467); (b) enemy goods abandoned before the coming into force of the Treaty of Peace Order to a neutral underwriter, after seizure under the Reprisals Order in Council, would have to be treated as goods of neutral ownership (the *Tomsk* and the *Frederick VIII*, 10 L. Rep. 588);

(3) In order to establish that by reason of the provisions of Section 6 of the Trading with the Enemy (Amendment) Act, 1914, the abandonment of the diamonds in this case after seizure but before the coming into force of the Treaty of Peace Order, had not the

effect of transferring the property to the plaintiff company, who were neutrals, so as to prevent the diamonds from being covered by the charge created under Article 297 of the Peace Treaty, it was necessary to show (1) that the abandonment was (a) an assignment, of (b) a chose in action within the meaning of the expressions in the section, and (2) that the Administrator (the Defendant) could rely upon the section, although he and his predecessor, the Custodian of Enemy Property, were officers of the Crown, and on the general principle that the Act did not bind the Crown, and an officer of the Crown, acting as such, could not be guilty of the offence of trading with the enemy under the Act, if he paid or discharged a debt or chose in action to a person to whom it had been assigned by an enemy;

(4) As regards point (c) in paragraph (3) above, he held that the Defendant, in relying on the Act, was using the Act as a defence to protect the interests of the Crown, and that that was a different thing from contending that the Act bound the Crown so as to restrict the rights of the Crown to pay or discharge assigned debts or choses in action;

(5) As regards (a) of paragraph (3) above, the abandonment of assured property to the assurers, and their acceptance of it *prima facie* passes to the assurers "whatever might remain of the insured property and all proprietary rights incidental thereto and also, by subrogation, any rights incidental to the property which were not proprietary but were claims for damages against third parties". Though the transfer effected by an accepted abandonment is not an express assignment, it is an assignment by operation of law, and he held (following the decision of Tomlin J. in *Fried v. The Administrator of German Property*, [1925] Ch. 757; *British Year Book of International Law*, 1926, at p. 215) that the word "assignment" in Section 6 of the Trading with the Enemy (Amendment) Act, 1914, included assignments by operation of law, and therefore that there was an assignment in this case within the meaning of that section;

(6) As regards (b) in paragraph (3) above, the question was whether what Ehni & Co. assigned to the plaintiff company was a "chose in action" within the meaning of the section. At the time of the assignment the diamonds had been seized and were held by the Marshal of the Prize Court until such time as the Court should make a further order as to what was to be done with them, and (except on the application of the Crown) the Court could make no order for the delivery of the diamonds or the payment of the proceeds of their sale to any person until the conclusion of peace.¹ In these circumstances Ehni & Co.'s rights in respect of the diamonds could only be described as "choses in action". The Administrator had never had the diamonds but only the proceeds of their sale; no claim was or could be made against him for the jewels; it was at most a claim against him for not paying the proceeds of their sale to the plaintiff company, or for wrong payment of their proceeds into the fund charged under the Peace Treaty. This claim was a chose in action.

(7) For these reasons he held that the claim of the plaintiff company was one which was barred by Section 6 of the Trading with the Enemy (Amendment) Act, 1914.

Greer L.J. and Slesser L.J. delivered judgments in favour of the Appellant (Defendant).

DECISIONS OF THE UNITED STATES SUPREME COURT

Non-eligibility of Pacifist Aliens to Naturalization.

On May 25, 1931, the Supreme Court, by a vote of five to four, affirmed the decisions of the Federal Circuit Court of Appeals in the cases of Professor Douglas MacIntosh and Miss Marie Bland that an alien who refuses to take an oath without reservation that he or she is willing to bear arms in defence of the Constitu-

¹ Scrutton L.J. was of the opinion that the Order of the Prize Court of 1925, ordering the proceeds of the diamonds to be paid to the Defendant, was a judgment *in rem* and itself gave the Defendant a title which could not be disputed by the plaintiff company. Roche J. had expressed the same opinion in the Court below; but the Defendant expressly desired not to rely on this ground and requested the Court not to base its decision upon it as he desired to obtain a decision on the contention based on Section 6 of the Trading with the Enemy Act, and the Court acceded to this request.

tion of the United States, is not eligible to naturalization as an American citizen.¹ The principal facts relative to these cases are set forth in this *Year Book* for 1931 (p. 203). It is sufficient to repeat here that Dr. MacIntosh is a British subject and a professor in Yale University. During the World War he served as a chaplain with the Canadian forces. Miss Bland, also a British subject, served during the war as a nurse with the American army in France. Professor MacIntosh was unwilling to give an unconditional promise in advance to bear arms in a war which in his opinion might not be "morally justified", and Miss Bland alleged religious scruples against bearing arms under any circumstances in war. The majority of the court held that such reservations did not meet the requirements of the oath prescribed by the naturalization law, that an alien must swear to defend the Constitution against all enemies. An applicant could not, they said, put his allegiance to God above his allegiance to the country and be permitted to determine for himself whether a war in which he might be called upon to bear arms was morally justified or not. "The war power", it was added, "from its very nature, when necessity calls for its exercise, tolerates no qualifications or limitations unless found in the Constitution or in applicable principles of international law". From this decision four judges of the Court, Hughes, Brandeis, Holmes, and Stone, dissented. Chief Justice Hughes, who wrote the dissenting opinion, denied that the language of the Naturalization Act, which requires in general terms an oath to defend the country, could be interpreted to require of applicants a promise to "bear arms". If Congress, he said, had intended to exact such a promise, it would have employed unequivocal language to that effect and would not have left it to implication. "Dr. MacIntosh", he added, "had shown himself by his behaviour and character that he was highly desirable as a citizen, and if such a man is to be excluded from naturalization, I think the disqualification should be found in unambiguous terms and not in an implication which shuts him out and gives admission to a host far less worthy". He further pointed out that there were other important methods of defence than the bearing of arms, such as Professor MacIntosh had himself demonstrated by his service as a chaplain in the army, and as Miss Bland had done as an army nurse. Still other examples of defence were furnished during the late war by the valuable service rendered by numerous workers in the war industries. Finally, the exaction of a promise to bear arms was for large numbers of persons a religious test, and it was never the intention of Congress to prescribe such a test. On the contrary, it had long been the policy of Congress to exempt from military service those whose religious convictions condemned the bearing of arms in war. As to Professor MacIntosh's claim of right to determine for himself whether a particular war in which he might be required to bear arms was morally justified, the Chief Justice declared that there was nothing new in such an attitude. "Among the most eminent statesmen here and abroad", he said, "have been those who condemned the action of their country in entering wars they thought to be unjustified". Agreements for the renunciation of war presupposed a preponderant public sentiment against wars of aggression. "If, while recognizing the power of Congress, the mere holding of religious or conscientious scruples against all wars should not disqualify a citizen from holding office in this country, or an applicant otherwise qualified from being admitted to citizenship, there would seem to be no reason why a reservation of religious or conscientious objection to

¹ *U.S. v. MacIntosh*, 283 U.S. 605; *U.S. v. Bland*, 283 U.S. 636.

participation in wars believed to be unjust should constitute such a disqualification." The decisions of the majority in these cases have provoked much controversy among members of the bar in the United States. They have been criticized especially by the religious press and religious organizations, which are conducting a propaganda for the amendment of the statute so as to overrule the decisions by legislation.

Alteration of Boundaries—Accretion and Avulsion.

The case of *Louisiana v. Mississippi*,¹ decided February 2, 1931, added another to the somewhat long list of cases which have been brought before the Supreme Court involving interstate boundary controversies arising out of changes in the bed of the Mississippi river. In this, as well as the previous cases, the Supreme Court based its decision on the generally recognized rule of international law relative to the distinction between changes caused in the bed of boundary streams by erosion and accretion on the one hand, and by avulsion on the other. Both parties to the present suit admitted the validity and applicability of this rule, the main controversy, as usual, being as to whether the change in the river bed was the result of accretion or avulsion. The Court found that the bed of the river had shifted between 1823 and 1912-13 eastward by erosion of the Mississippi shore and the deposit of the alluvium on the opposite Louisiana shore. By this process an area of land five or six miles in length and several miles in width was added to the State of Louisiana. The Court held that the territory so transferred became a part of the latter state. In 1912-13 the river suddenly abandoned its bed and returned to the old channel which had in the meantime filled up. The result was that the territory, which had prior to 1912 been transferred to Louisiana, was now left on the Mississippi side of the river. The Court held, however, that, the change being the result of avulsion, the boundary line remained where it was prior to 1912, and the territory was, therefore, still a part of the State of Louisiana, although it was now east of the present river bed which was no longer the boundary between the two states at this point. Mississippi asserted a claim to the territory, based on alleged possession or exercise of sovereignty thereover, but the Court found that there was no evidence of such assertion of dominion other than assessment rolls describing the land in dispute—evidence which was insufficient to establish title thereto.

Diversion of Waters.

The case of *Connecticut v. Massachusetts* relative to the diversion of water from the Connecticut river, concerning which there was a note in this *Year Book* for 1930 (p. 195), was decided by the Supreme Court on February 24, 1931.² It was one of a number of cases of the kind which have been brought before the Supreme Court in recent years. The facts of the present case were briefly stated in the note referred to. The suit was brought by Connecticut against Massachusetts to enjoin her from diverting the waters of two small non-navigable streams, wholly within the State of Massachusetts, but tributary to the Connecticut river which flows through both states. The purpose of the diversion was to provide a water-supply for Boston and various neighbouring cities and towns. Connecti-

¹ 282 U.S. 458.

² 282 U.S. 660; reprinted in *American Journal of International Law*, January 1932, pp. 163 ff.

cut based her claim for the injunction upon the common law doctrine, which it was asserted Massachusetts herself recognized, that riparian owners have a right to the undiminished flow of a common stream, free from contamination or burden upon it. The proposed diversion, it was alleged, would take water tributary to the Connecticut river entirely out of its watershed, impair the navigability of the stream, and cause damage to agricultural lands belonging to citizens of the state. As in similar cases in the past, the Court found that the prospective damages alleged would be negligible in comparison with the public benefit to the people of the respondent state. It accordingly dismissed the complaint without prejudice to the right of Connecticut to bring suit against Massachusetts in the future whenever it should appear that substantial interests of Connecticut were being injured by an increase of the diversion. Regarding Connecticut's claim that the common law rule in force in both states, according to which each riparian owner has a vested and unimpaired right in the use of the waters of a common stream, should be applied, the Court declared that this rule did not constitute a "dependable guide or just basis" for the decision of a controversy between states, involving diversion of water to provide a supply for the domestic use of the inhabitants of one of the states, but that the dispute must be decided according to the principle of equitable apportionment. The Court pointed out that the common law rule did not obtain in some of the states of the American Union, particularly in the west, where the principles of appropriation and equitable apportionment are applied in determining the legality of a diversion. (See the cases of *Kansas v. Colorado*, 206 U.S. 46; and *Wyoming v. Colorado*, 259 U.S. 414, where similar controversies were decided on these principles. See also an article by Professor H. A. Smith on "The Chicago Diversion" in this *Year Book* for 1929, pp. 144 ff.) The Court added that while the strict rules of municipal law applicable to controversies between individuals relative to the diversion of waters would be taken into account, they were not controlling in similar controversies between states. Such disputes must be decided on the basis of equality of right. This does not mean that there must be an equal division of the waters of an interstate stream among the states through which it flows; it means merely an equitable apportionment among them of the use of such waters. A somewhat similar case was that of *Arizona v. California*,¹ decided May 18, 1931, in which the Supreme Court dismissed without prejudice a bill brought by Arizona against the Secretary of the Interior and certain other states to enjoin the construction by the United States of the Boulder Dam and storage reservoir on the Colorado river which at that point is a boundary stream between the two states. The reservoir is to be stored with water diverted in part from Arizona for consumptive use outside the state. Arizona based its claim on its alleged right to control the appropriation and use of waters within its boundaries and to preserve them for the use of its own people. Construction of the dam and reservoir without its consent, would, it was alleged, constitute an invasion of the "quasi-sovereignty" of the state by preventing it from prohibiting or permitting the appropriation of the unappropriated waters of a river flowing through the state. The Court denied the truth of the allegation as to the threatened invasion of the sovereignty of Arizona, and asserted that since the river was a navigable stream, or was formerly such—a contention which Arizona denied—the Congress of the United States had constitutional authority to construct a dam across it. As to Arizona's claim

¹ 283 U.S. 449.

of a vested right to appropriate water flowing within the state, the Court declared that no such right could be acquired until the state had constructed the necessary dams, reservoirs, canals, &c., by means of which the water could be impounded and distributed. Finally, the Court declared that it would not enjoin the construction of a dam authorized by Congress for the purpose of impounding the flow waters of a river in aid of navigation, irrigation, and power development, on the ground that by the diversion of such waters for irrigation in one state, another state would be deprived of its right to make appropriations thereof, if the waters to which it is entitled have never been and may never be appropriated.

Right of Alien Subject of Unrecognized Government to sue the United States.

In the case of the *Russian Volunteer Fleet*, petitioner, v. *the United States*,¹ decided February 24, 1931, the Supreme Court was called on to decide whether a corporation organized under the laws of Russia, the Government of which had not been recognized by the United States, could bring a suit against the United States in the Federal Court of Claims to recover just compensation for the requisitioning by the United States Shipping Board Fleet Corporation during the world war of contracts for the construction of two vessels. The Court of Claims had dismissed the suit for alleged lack of jurisdiction due to the fact that the United States had not recognized the Government of Soviet Russia. In this connexion the Court of Claims held that the provisions of the Federal Judicial Code which admits "aliens who are citizens or subjects of any Government which accords to citizens of the United States the right to prosecute claims against such Government in its Courts" to bring suits against the United States in the Court of Claims, had reference only to the citizens or subjects of states whose Governments had been recognized by the proper authorities of the United States. The Supreme Court reversed the decision of the Court of Claims and held that any alien whose contracts for the construction of vessels had been requisitioned by the Shipping Board under the Act of June 15, 1917, was entitled to bring an action against the United States for compensation, irrespective of whether or not citizens of the United States were entitled to prosecute claims against the Government of such alien's country in its courts and whether or not the United States had recognized the Government of his country. Mr. Chief Justice Hughes, who gave the opinion of the Court, asserted that under the Fifth Amendment of the Federal Constitution an alien friend is entitled to protection against the taking of his property for public use without just compensation; this provision of the Constitution, he said, established a standard for the Government of the United States which was not made dependent upon the standards of other Governments. Furthermore, there was no warrant for imputing to Congress an intention to limit the right of aliens to recover just compensation for property taken, to alien friends only whose Governments were recognized by the United States at the time the recovery was sought. The Chief Justice added that an Act of Congress imposing such a condition would be of doubtful constitutional validity.

Right of Consul to Assets of fellow National dying Intestate and without Relatives.

In the case of *Santovincenzo, Consul of Italy at New York v. Egan, Public Administrator*, decided November 23, 1931,² the Supreme Court was called upon

¹ 282 U.S. 481; reprinted in *American Journal of International Law*, January 1932, pp. 159 ff.

² 52 Supreme Court Reporter, 81.

to interpret a provision of the consular convention of 1878 between the United States and Italy relative to the disposal of property left by Italian subjects dying in the United States. Santovincenzo, without known relatives, died intestate in New York prior to 1925, leaving assets of the estimated value of more than \$900,000. The Italian Consul at New York claimed the assets on behalf of his Government, basing his claim on the "most-favoured-nation" clause in the consular convention of 1878 and a treaty of 1858 between the United States and Persia which promised that in such cases as this the decedent's effects should be delivered to the consul of the country of which he was a citizen or subject, for disposal in accordance with the laws of his country. It happened that this treaty had been terminated in 1928, but the date of termination being subsequent to the death of Santovincenzo, the Supreme Court ruled that the termination of the treaty had no effect on the present case. The lower courts of New York held, and it was affirmed by the Court of Appeals, that the balance of the assets of the estate should be paid into the treasury of New York City for the benefit and use of the decedent's unknown relatives, which meant that they would ultimately find their way into the treasury of New York State. This decision the Supreme Court of the United States reversed on the ground that by virtue of the "most-favoured-nation" clause in the consular convention, the Italian Consul was entitled to the benefit of Article 6 of the Treaty with Persia referred to above, and therefore the net assets of the estate should be delivered to him for disposal in accordance with the laws of Italy. In the lower courts of New York the point was made that Santovincenzo was not only a "resident" of New York, but was also domiciled there, whereas the Persian Treaty mentioned only residents. This distinction the Supreme Court regarded as immaterial. Domicil, it said, is not a test of the enjoyment of rights of citizens of one country in the territory of another, residence alone being sufficient. Words in treaties, the Court added, must be taken in their ordinary meaning as understood in the public law of nations.

DECISION OF THE UNITED STATES COURT OF CLAIMS

Indemnity for Damages under International Law.

IN the case of the *Royal Holland Lloyd, a corporation v. the United States*¹ a suit was brought by a Dutch Corporation against the United States in the Court of Claims under a special jurisdictional Act of Congress to recover damages to the amount of \$446,826, alleged to have been sustained by the plaintiff by reason of the detention by the American authorities of its vessel, the *Zeelandia*, in the harbour of New York from October 22, 1917, to March 21, 1918. The ship was bound from various South American ports to Amsterdam with a cargo consigned to the Netherlands Overseas Trust Company. It put into the port of New York in October 1917, during the war between the United States and Germany, and was refused clearance from October 22, 1917, to March 21, 1918, on which later date it was formally seized and requisitioned by the authorities of the United States and placed in its naval service. The claim for damages was for the detention of the vessel during this period. The claimant contended that the detention was contrary to the statutes of the United States, and constituted

¹ Decided December 7, 1931.

the taking of private property, for which it was entitled to compensation under the Fifth Amendment to the Constitution. The Court, however, held that the detention did not involve the taking of the plaintiff's property. As to the liability of the United States for the alleged illegal and unauthorized acts of its officers in detaining the vessel, the Court asserted that it was a settled principle of American law that the "Government of the United States has never subjected itself to liability for the torts or unauthorized acts of its officers". The plaintiff, therefore, had no remedy under the municipal law of the United States. Did he have a remedy under the principles of international law? The Court considered that the purpose of the Act of Congress in authorizing it to hear the case was to enable the plaintiff to invoke any rules or principles of international law that were applicable to the facts of the case. The negotiations between the two Governments strengthened this conclusion. The function of the Court in this case was analogous to that of an arbitration tribunal and it must apply the rules of international law in reaching its decision. While the United States does not admit infra-territorially any responsibility, subject to a few exceptions, for the tortious or unauthorized acts of its officers, in its relations with foreign nations it bears what Oppenheim described as a "wide, unlimited, unrestricted and vicarious responsibility" for the acts of its agents. The *Zeelandia* was entitled as a matter of right to her clearance papers under the laws of the United States as well as the law of nations; damage was, therefore, sustained by the plaintiff by the ship's detention, for which the United States under clear principles of international law must assume the responsibility. The full amount of the claim was awarded, as well as interest at 5 per cent. on the amount from March 20, 1918, to the date of the present decision. The question of the right of the plaintiff to interest, it was added, must be determined "according to the principles of international law, wholly without reference to the municipal laws of the United States". The general rule of international law is that interest is allowable in all cases where the loss is either liquidated or is capable of ascertainment by computation merely.

JAMES W. GARNER.

REVIEWS OF BOOKS

Académie de Droit International: Recueil des Cours, 1930. Four volumes, in all 3,406 pages. Paris: Sirey.

These volumes (nos. 31-4 in the series) contain the texts of twenty-six courses delivered at the Academy in 1930.

The Curatorium has continued the very useful practice of having in each part of the session a comprehensive course on the *Règles générales du droit de la Paix*. This year these courses were delivered by M. Charles Dupuis and M. Séfériadès, and it is hardly necessary to say that what they write is interesting and valuable.

English scholarship was represented in the year under review by Sir John Fischer Williams (*L'assistance financière aux Etats victimes d'agression*) and by Dr. Lauterpacht (*Les différends non justiciables*). Sir John believes that the Convention for Financial Assistance may prove to be important both politically and financially. He suggests three respects in which it is also juridically interesting: the combination of a loan by individuals to a state with a guarantee of the loan by other states, so that the curious situation may arise of a state (the guarantor) being subrogated to the rights of individuals (the original creditors); the relation of the Convention to the pre-War doctrines of neutrality; and its character as an automatic sanction. Dr. Lauterpacht's course is shortly to appear in English in a fuller form and will be reviewed in the *Year Book* in due course.

The veteran Baron Descamps (*L'influence de la condamnation de la guerre sur l'évolution juridique internationale*) writes lucidly and with a detailed knowledge of post-War attempts to stabilize peace. A *notice biographique* shows that Baron Descamps was born in 1847, and it is a fine thing that he should take up the pen to welcome and expound the "droit international nouveau". He has coined the expressive word *pacigérat* to describe the juridical régime introduced by the Pact of Paris; at first the inferior, then (as a neutral) juridically the equal of the belligerent, the "pacigérant" is now his superior in law, though the task of building on the new foundation is not yet complete.

M. Barcia Trelles (*La doctrine de Monroe*) gives a lively and detailed account of the diplomatic events leading up to the Message of 1823. He vigorously refutes the thesis that Latin-America owed her liberty to Monroe; she owed it above all to the policy of England. The latter part of the course examines the place of the doctrine in modern inter-American relations. The treatment is more polemical than is usual at the Academy (some hard things are said of the policy of the United States), but it is useful to have a frank presentation of this particular point of view. There are interesting discussions of the effect of Article 21 of the Covenant, and of the Habana Conference of 1928. Professor Pitman B. Potter (*Le droit moderne de l'intervention*) presents the antidote to M. Trelles' views in a course which may not unfairly be described as giving the "Great Power" view of the inevitability of interventions. The treatment is interesting, though the writer perhaps under-estimates the evils of the present practice, and some of his arguments seem unduly complacent, as when he explains that the reason why one Great Power does not use intervention against another is because it has no need to; it is pretty sure to obtain equitable reparation without doing so. Baron Michel de Taube (*L'inviolabilité des traités*) examines his subject historically from the earliest times. He regards the *clausula rebus sic stantibus* (the authorship of which

he attributes to Thomas Aquinas) as at once "necessary and dangerous", but he places its application on a sound juridical basis by limiting it to stipulations which are either expressly or tacitly conditional. The course concludes by emphasizing the inevitable connexion between the inviolability and the revision of treaties. M. Kunz (*L'option de nationalité*) eloquently explains one aspect of the human tragedies which have been the consequence in Central Europe, not of the War, but of the treaties of peace. M. Mercier (*L'extradition*) examines the possibilities either of a general international convention, or of a uniformity of national laws on extradition. He does not discuss whether, so long as there is no uniform standard in the administration of national systems of justice, uniformity of practice is desirable in this matter. But surely the root of the matter is that extradition rests on mutual confidence, and the grounds for that confidence are not yet universally present. M. Travers (*La nationalité des sociétés commerciales*) argues that the concept of nationality may usefully be applied to commercial companies, and that the least imperfect test for this purpose is the *siège social*. He thinks the objections may be met by differentiating between companies in respect of the rights that flow from nationality, e.g. something more than a *siège social* should be required before diplomatic protection is accorded. M. Gaston y Marin (*Les transformations du droit administratif international*) sees the beginning of a transformation in international administrative law similar to that which, according to M. Duguit, the idea of *service public* has brought about in internal public law. M. Pella (*La répression des crimes contre la personnalité de l'État*) makes a further exploration of a subject on which his views have already attracted attention. M. Strupp (*Le pouvoir du juge international de statuer en équité*) maintains his well-known positivist views in a field where it is particularly difficult to reconcile them with international practice. Studies of more specialized topics are given by M. Niboyet (*La double imposition au point de vue juridique*); M. Octavio (*Les sauvages américains devant le droit*); M. Muller (*L'œuvre des confessions chrétiennes pour la paix*); M. de la Brière (*La condition juridique de la Cité du Vatican*); M. Vitta (*Le droit sanitaire international*); M. Yepes (*La contribution de l'Amérique latine*); and Baron Heyking (*Théorie et pratique des services consulaires*).

In private international law, Dr. Daneff and M. Trias de Bes deal respectively with the doctrine and practice of the subject in Bulgaria and Spain. M. René Cassin's course (*La nouvelle conception du domicile dans le règlement des conflits de lois*) is interesting for its account of the various factors, some of them little appreciated in a country where domicile has never been dethroned, which are combining to make nationality a less and less satisfactory test of personal status. M. Cassin is one of the younger Continental lawyers who have begun to advocate a return to domicile, and the countries of domicile might well consider whether they cannot go some way to meet this movement by concessions on their side. M. Bartin (*La doctrine des qualifications et ses rapports avec le caractère national du conflit des lois*) argues that the conflict of laws is necessarily a branch of national law for the reason that its apparently general rules must be applied to a particular issue and the judge necessarily "qualifies", i.e. characterizes, the issue (e.g. he decides whether the question is one of form or of capacity) by applying the *lex fori*. Thus "c'est la *lex fori* qui a le dernier mot". The same reasoning might, it seems, be held to prove the national character of all international law whenever it falls to be applied in national courts. M. Frankenstein (*Les nouvelles tendances du droit international*) after premising that a revolutionary age needs a revolution in legal theory, sets forth a new theory of private international law based

apparently on the idea that the link between an individual and his national law is psychologically so intimate that it constitutes the primary factor of which the law should take account; the territorial principle, where it conflicts with this, is "un principe ennemi". The theory does not profess to be a deduction from present practice, and it is, I think, an exaggeration to call it a *nouvelle tendance*. It obviously invites most serious criticism.

J. L. B.

Annual Digest of Public International Law Cases 1927-1928. Editors: Arnold D. McNair and H. Lauterpacht. London: Longmans, Green & Co. lii+592 pp. (42s.)

This second volume of the *Annual Digest* fully maintains the high standard set by the first. To any one interested in international law its contents are fascinating to read from cover to cover, although that is not the use for which it is primarily intended.

The *Digest* contains some 320 distinct cases, of which 100 are decisions of international, and the balance of municipal courts. The original scheme is adhered to of giving a short digest, followed where necessary by notes, classified according to the subject-matter of the decision. In this way different parts of the same case appear under separate heads. The immense labour involved in compiling this work is obvious, and it has been admirably done.

One is again impressed by the volume and scope of the cases involving international law dealt with in two years. Among matters of particular interest the following may be specially mentioned. The outstanding case is the award of M. Huber in the Island of Palmas Arbitration between the United States and Holland, which is digested under five heads, each of which touches important questions of international law, which are dealt with by the learned arbitrator with his accustomed insight and authority. There is a large group of Mexican Claims Commissions cases, many of them hitherto unreported, which throw much light on questions relating to the responsibility of states. One of these Mixed Claims cases deals in an illuminating manner with an unexpected point: the effect of Article 18 of the Covenant as to the registration of treaties with the League. Still in the international sphere, there are two decisions relating to the vexed subject of prescription at international law, and an interesting group relating to the interpretation of treaties (preparatory work and so on). As regards municipal decisions, there are the usual batches of American cases arising out of the enforcement of prohibition with its attendant problem of international law, and of decisions from various countries relating to Soviet legislation, which again illustrate the differences in judicial outlook on this subject. There are numerous cases upon the relation between international and national law. There are several cases touching the effect of most-favoured-nation clauses in commercial treaties, including one which raises the point whether revalorization can be claimed under a clause prohibiting deprivation of property without compensation. The effect of the *clausula rebus sic stantibus* in international law is considered by the Swiss Federal Court; questions of state succession by the Polish courts. The judgment of the German Staatsgerichtshof in the *Donauversinkung* case contains notable observations on the law relating to the utilization of the flow of international rivers.

These are only a few of the many important questions dealt with, but suffice to show that this work is invaluable and indispensable both to the practitioner and the student. Happily, two more volumes are promised for next year.

A. P. F.

La Zona di Tangeri nel Diritto Internazionale e nel Diritto Marocchino. By Dr. Claudio Baldoni. Padova: Cedam. (7 lire.)

I think that all will agree with Dr. Baldoni that—

“la situazione di Tangeri, discostandosi dal concetto tradizionale di protettorato, sembra dar vita ad una nuova forma, alla quale, sia per la diversità delle funzioni esercitate esclusivamente da uno solo degli Stati protettori in confronto a quelle esercitate dal medesimo insieme con gli altri, sia per i limiti imposti all'azione dell'uno dagli obblighi assunti verso i rimanenti, si potrebbe dare il nome di ‘protettorato controllato’.”

The status of Tangier is a species of what is called a “collective protectorate”, but French influence is certainly paramount even after the Paris Convention of July 25, 1928. Suffice it to say that, by Article 5 of this Convention, Article 5 of the Fez Treaty of March 30, 1912, is kept alive: this Article provides that—

“Le Commissaire Résident général sera le seul intermédiaire du Sultan auprès des représentants étrangers et dans les rapports que ces représentants entretiennent avec le Gouvernement marocain. Il sera, notamment, chargé de toutes les questions intéressant les étrangers dans l'Empire Cherifien.”

After a careful analysis of the status given to Tangier in International Law by the Paris Convention, Dr. Baldoni gives us a detailed and accurate account of the legislative, administrative, financial, and military organization in the Tangier zone, and comes to the conclusion that Tangier is now (i) a corporate body, and (ii) an “autonomous” body. Whether this latter can truly be said is dependent upon the meaning given to “autonomy”: if by this we understand that the inhabitants live by their own laws, then the description is inapplicable; if, on the other hand, we mean by the word “autonomy” that degree of independence granted by the Convention, then clearly the word is accurately used.

GIUSEPPE M. PALLICCIA.

Le Mandat sur la Palestine. Par Abraham Baumkoller. Paris: Rousseau et Cie. 1931. 254 pp. (30 Frs.)

Probably there is no part of the 1919 settlement which continues to occasion so heavy an outpouring of literature as the Mandate System, and particularly the Palestine mandate, which has certain peculiar features, such as the Jewish Agency and the Jewish National Home, which make it more than usually complex. Dr. Baumkoller's book is not primarily legal, and is concerned rather with the historical and other factors which led to the establishment of the mandate and with an estimate of the degree of success which the mandate has achieved. The two main objects of the Palestinian mandate have been defined by the Permanent Mandates Commission as (1) the establishment of a Jewish National Home, and (2) the development of the institutions of self-government. Dr. Baumkoller inclines to the view that the mandatory Power has been so obsessed with the duty of holding the balance fairly between the Jews and Arabs that it has abstained from taking much initiative in founding a Jewish National Home, through fear of leaning too much in favour of one national group at the expense of the other. Consequently, he considers, the Jewish National Home has been left to look after itself.

A. D. McN.

La Commission Européenne du Danube et son Œuvre de 1856 à 1931. Paris: Imprimerie Nationale. 1931. viii+525. pp.

This splendid volume is published to celebrate the sixty-fifth anniversary of the institution of the European Commission of the Danube, which was established

by the Treaty of Paris, 1856. It has been prepared for the Commission by Professor Carlo Rossetti, the Italian Delegate on the Commission, with the collaboration of M. Francis Rey, the Secretary-General. It is pointed out in the preface that, though the international régime of the Danube has been the object of various studies, the work of the Commission has received little attention. This is probably due to the difficulty of obtaining access to the necessary documents and also to the nature of the work of the Commission, which is essentially of a technical character. With the publication of this volume the immense labour and the great difficulties of the work of the Commission are now made known to the world at large, and every one who is interested in the subject of international fluvial navigation, both on its legal and on its technical side, will welcome the appearance of this official publication. It is provided with excellent photographs, both of the members of the Commission at various stages in the period, and of work done in improving the navigation of the river; numerous maps are also provided. The volume also contains a complete collection of the international documents dealing with the position of the Commission from the Treaty of Paris to the Statute of 1921, when the Commission became permanent.

It is difficult in the space at our disposal to discuss adequately the various topics dealt with by the authors. The first part deals with the Danube before 1856, and then comments on the international documents governing the work of the Commission. The second part is concerned with the administrative organization; the third part deals with the finances of the Commission, while the fourth and fifth parts describe the works executed under the Commission and the regulations made for the safety of navigation of the river.

The value of the work is increased by a Table of Contents and Index, and the whole reflects the greatest credit on the *Imprimerie Nationale*.

A. PEARCE HIGGINS.

Public Debts and State Succession. By Ernest H. Feilchenfeld, J.U.D. Berlin, Assistant Professor Harvard Law School. New York: The Macmillan Company. 1931. xxx+922 pp. (\$10.)

This is a great work. It frees for all time writers of text-books on State Succession from the criticism of the late Mr. W. E. Hall, that the books were unsatisfactory and that the writers tended to copy each other. Both in the thoroughness with which precedents have been collected and analysed, and in the line which the author takes in the later part of the work, where he states and discusses his conclusions, the book will stand out from all its predecessors. The only work to compare with it is Sack's *Les effets des transformations des états sur leurs dettes publiques et autres obligations financières*, published in 1927, and when that book appeared Dr. Feilchenfeld was already at work on the present treatise.

The first five sections of the work—occupying between them over 550 pages—deal with the history of the subject. Each of these five sections covers a certain period of time; the first deals with the period preceding the French Revolution, the second covers the period from 1790 to 1830, the third that from 1830 to 1878, the fourth that from 1878 till 1918, and the last deals with the great peace treaties and the developments since 1918. Each section is subdivided so as to present in an intelligible and connected form the story of the various cessions or annexations of territory or dismemberment of states which took place, and the practice followed by governments as regards the debts of the governments

concerned. There is also in each section an account of the line taken by the writers on international law whose works, published during that period, dealt with the question of State Succession.

It is amazing what a mass of historical material the author has got together.

The last 300 pages of the book—which by themselves would constitute a volume of no mean size—contain Dr. Feilchenfeld's analysis of all the historical material he has collected and the conclusions which he deduces.

These conclusions can only be stated very shortly. Positive international law on the subject there is none, except the broad principle of the maintenance and respect of debts, and that is not so much a rule of law as a standard of behaviour which international law regards as a minimum requirement for the treatment of individuals (p. 640). It is a principle which does not operate only on occasions of state succession; it is a general principle. Debts are only another form of property, and it is as such that they get the benefit of the rule of maintenance.

The above is the fundamental principle which governs all Dr. Feilchenfeld's views. Justice and efficiency must be the guiding principle which should dominate the settlement as to public debts in every case where a state succession takes place, but the facts of every case differ, and a settlement must be governed by the facts of the case and not by merely theoretical tests.

Little or no improvement is seen by the author in the position to-day of the creditor of part of the public debt of a state which is annexed, dismembered, or loses or gains territory, as compared with his position in the time of Grotius. No great progress in the future can be looked for from the decisions of international tribunals, because so seldom does a dispute arise in matters of this kind on a question of right submitted to a tribunal; nor from codification, because it is inadvisable to create detailed rules which must be followed in each settlement. More might be hoped for if agreement were come to for the establishment of a permanent Financial Commission of independent experts, available for the handling of debt settlements whenever opportunity arose. An interesting section is to be found at the extreme end of the book, in which the author discusses the measures which creditors of public debts might themselves take for the improvement of the legal position which such debts enjoy. As regards the proposed Financial Commission, it is not clear why the permanent Financial Committee of the League of Nations should not fulfil all that Dr. Feilchenfeld has in mind, without creating a new body.

This is not a book for students. As the writer himself says (p. 886), one of the intended functions of the work is to enable tribunals to find the law more conveniently. The study is too detailed for those who desire to take a general view of international law. It is to the expert, engaged in handling concrete problems, that the book will be useful. If such a work had been in existence in 1919, it would have been invaluable to those who were striving to grapple with the problems dealt with in Part IX (Financial Clauses) of the great Peace Treaties of that year.

C.

Fontes Juris Gentium. Edidit Viktor Bruns. Series A, Sectio I, Tomus I, Digest of the Decisions of the Permanent Court of International Justice, 1922–30, xlvii+260 pp.; Tomus II, Digest of the Decisions of the Permanent Court of Arbitration, 1902–28, xxiii+306 pp.; Sectio II, Tomus I, Decisions of the German Supreme Court relating to International Law, 1879–1929, xxxii+944 pp. 1931. Berlin: Carl Heymanns Verlag.

These are the first volumes of an important enterprise which has been undertaken by the *Institut für ausländisches öffentliches Recht und Völkerrecht*. The completed work will consist of four series of publications. Series A is a digest of the decisions and opinions of international courts, and of the highest courts of the most important states, in so far as the latter deal with international law; Series B will contain principles derived from documents of different kinds published by the most important states; Series C a digest of opinions and decisions of international organs other than courts; and Series D a digest of clauses of the most important treaties concluded since the beginning of the nineteenth century, designed to present a survey of the manner in which international problems have been regulated by treaty, both as regards form and substance. Under the general editorship of Dr. Bruns, the Director of the Institute, the management of the undertaking is in the hands of Dr. Ernst Schmitz. Each volume, however, is stated to be the work of its individual editors.

The general aim of the enterprise is to sift and arrange the vast bulk of the materials which confront the student of international law, and thus to facilitate a greater measure of objectivity in practice and in research. The Editors do not suppose that every statement of principle which they include is or ought to be accepted as a principle of law. On the contrary they wish to present the student with a guide to all the possible sources of law, and it will be for him to investigate and evaluate the materials to which he is referred. If this is borne in mind, one of the possible dangers of a publication of this kind, namely, that it may be taken as professing to be a more or less authoritative presentation of the principles of international law and of nothing that is not international law, is eliminated. The aim is, in fact, a really comprehensive survey of different forms of international practice, out of which the serious student must select for himself the basic principles of the law.

It is not easy to express an opinion on the value of a programme so ambitious on the strength only of the present volumes, all of which belong to Series A, for that series relates to a type of source material which is both more accessible and more easily manageable than those contemplated in the other series. With the general object of the Editors every international lawyer will sympathize, even if he may feel, though Dr. Bruns disclaims any such intention, that the provision of so very full a guide to existing material may possibly have for one result to increase the quantity of the materials with which the student already has to contend. The volumes now issued are something more than a digest in the English sense. They contain extracts from the judgments, without editorial comment or condensation, but arranged for convenience under subject headings. It is the Editors' declared intention that a study of the decisions themselves should remain indispensable for all more profound research; but if that is so, and it is clearly right that it should be so, may it not be that something rather less than the Editors have provided, something more in the nature of a full and reasoned index to the decisions, might have been equally useful? At present there may be a danger that the considerable length of many of the citations, divorced though they are from the full context in which they occur, may encourage the habit of relying on the authority of the digest alone.

The citations from the Permanent Court are given in the languages of the Court, English and French; those from the Court of Arbitration and from the German Supreme Court, in English, French, and German, except that the second part of the volume of German decisions contains, in German only, the facts and

a fuller extract from the original judgments from which the citations are taken. This wealth of languages is, of course, a convenience, but it is a luxury which adds considerably to the bulk of the work.

International lawyers will undoubtedly look forward to the future development of this important undertaking with interest and sympathy.

J. L. B.

Handboek van het Volkenrecht, door Mr. J. P. A. François, Buitengewoon Hoog-leeraar in het Volkenrecht aan de Nederlandsche Handelshoogeschool te Rotterdam. Eerste Deel. Zwolle: W. E. J. Tjeenk Willink. xx+611 pp.

International law is, or ought to be, the same the whole world over. But, since there are parts of it which are of more interest to one country than to another, books on international law from different countries commonly differ in the space devoted to their relative subjects and in their methods of approach. A reader of English books on the subject, for instance, cannot fail to notice the large space devoted to maritime law and to the laws of war. It is twenty years since de Louter published his *Stellig Volkenrecht*, and during those years the whole emphasis and much of the material of positivist international law has been changed. Professor François, therefore, has desired to write a Dutch book on international law. And he tells us that it is Dutch not only in respect of its language but also because of its special attention to Dutch material and Dutch legal ideas.

The author is a strict positivist. He denies that international law is a law of nature in the sense of a law unchangeable for all time. "It is the law which is valid for the international community in the stage of cultural development which it has attained." And again: "International law is a positive law . . . it is not a *jus constituendum*, but a *jus constitutum*." He attempts, therefore, to survey the whole of international relations, examining the legal rules which are recognized to govern them.

This volume is the first of two. It is divided into five parts: I. The Character of International Law; II. The Territory of International Law (*Rechtsgebied*); III. The Subjects of International Law; IV. Law-making; V. The Law regulating Treaties. One gathers from page 28 that Part V was originally intended to form part of Part IV, though both in the Table of Contents and the text it is numbered VI. The second volume will begin with the discussion of international administration; it will then deal with state wrongs and state responsibility, and then with the administration of international justice. Finally will come the maintenance of law, the sanctions of the League of Nations, and the law of war and neutrality. It can safely be said that if these subjects are treated as fully as those contained in the first volume, the second volume will be far from a "handbook".

Parts I and II each contain three sections. The "historical development" in the first occupies only two pages, and describes simply how the international community came about; the main object of the first part is, in fact, to discuss the concept of international law held by numerous writers from the Greeks to Kelsen, and the author's own views. Territory is dealt with under the three heads of Land, Sea, and Air; and this Part illustrates one of the chief characteristics of the book—its attempt to be at once brief and comprehensive. It mentions, for instance, the special cases of Macao, Sleswig, Holstein, and Löwenburg, Spitzbergen, &c.

Part III is the longest Part, and is divided into nine chapters, some of them containing several sections. Chapter I deals with the sovereign state, and

mentions permanent neutrality and neutralization. Dependent states occupy another chapter, and here again we meet the exhaustive list of examples after the manner of Fauchille. The League of Nations occupies the third chapter; "Regional understandings" (including the Union of Republics of the American Continent and Pan-Europe, as well as the Monroe Doctrine) the fourth; and the Holy See the fifth. The long sixth chapter is devoted to the individual as a subject of law, but deals also with nationality, legal authority over subjects (including minorities), and legal authority over aliens (including extra-territoriality). Chapter VII deals with corporations, Chapter VIII with ships, and Chapter IX with aeroplanes.

Most of the rest of the book deals with treaties, though such matters as customary law and codification receive attention in the fourth Part. But the final Part is concerned more with the contents of individual treaties and their interpretation than with treaties in general. In fact, this Part reads much like a catalogue. The Covenant of the League of Nations, in French and in English, occupies the Appendix.

It will be obvious from this summary that Professor François has aimed at including every fact of importance in international law. At the same time, he has not emulated Fauchille in giving the full bibliographical details. Frequently he is content to give a quotation from a recognized writer on the subject with which he is dealing. For example, he discusses the British Empire in five pages, which are all translated or paraphrased from Noel Baker or Pilotti. Often the facts form a catalogue, like the list of federal states, each with a short statement of its characteristics. "One of the British Dominions has the form of a federal state, viz. the Commonwealth of Australia consists of six 'original states'. The Union of South Africa and Canada are divided into 'provinces' and are not to be considered as federal states."—This is a fair sample of his method.

The expert in international law demands full discussion of the difficult unsettled problems; those of us who frequently need to refer to international law, without being experts, demand a full bibliographical apparatus. Since neither of these classes is satisfied by this book, we must presume that Professor François intends it for students. If this be so, we are not entitled to criticize or to suggest modifications, for each country has its own objects and its own methods in instructing students.

W. I. J.

La Coutume en Droit International. By G. Gianni. 1931. Paris: Pedone. 8vo. 184 pp. (40 frs.)

This is an interesting and scholarly discussion of a question of great historical and yet practical interest—the place of "custom" in International Law. Dr. Gianni begins his inquiry with an elaborate survey of the conceptions of "custom" in relation to International Law entertained by different schools of thought. We proceed from Gentilis to Grotius, from Grotius to Vattel, and over the whole ground occupied by the modernists—Franco-Belgian, Austro-German, Italian, Anglo-American, and Spanish-American.

Dr. Gianni next develops his own theory and analyses successively the formation of law, its authority, its proof, and its transformation and abrogation.

First, its formation: in the strict sense of the term, it depends on repetition of the acts which constitute it during an immemorial period and the common recognition of its existence and character. In a wider sense, a real international custom may spring from a basis of treaty, embodying principles of International

Law. Thus, in the Spanish-American War of 1898, Spain accepted the rules enunciated in the Declaration of Paris, 1856, to which she was not a party. Again, the custom may be an application of some rule of civil or private law, the cessation of the accumulation of interest when it reaches the amount of the principal (Yuilla, *Shortridge & Company*, October 21, 1861), the grant of compensation for *lucrum cessans* as well as for *damnum emergens* (*Cape Horn Pigeon* case, November 29, 1904) in circumstances in which reparation is due: indeed, the principle of *res judicata* itself (*Pious Funds* case, October 14, 1902). Diplomatic correspondence and the "doctrine" of jurists are other sources of international custom in its wider acceptation. The proof of custom is to be found in, and varies with, the different sources from which it springs, coupled with demonstration of its applicability to the particular case in which it is invoked. Its obligatory force, apart from the sanctions of any treaty or pact in which it may be embodied, is derived from the conviction of the states observing it that in doing so they are recognizing a pre-existent right and complying with a condition on which their membership of the Family of Nations may depend. Finally, custom may change its form, it may assume a conventional character—a phenomenon too familiar to call for the citation of ancient or modern instances, or, like the slave-trade, it may be definitively excluded from the realm of International Law.

Dr. Gianni's book is lucid, suggestive and well documented, and heartily to be recommended.

The League Committees and World Order. A study of the permanent expert Committees of the League of Nations as an instrument of international government. By H. R. G. Greaves. 1931. Oxford University Press. London: Humphrey Milford. xi+266 pp. (14s.)

This is a useful contribution towards the formulation of the principles of international constitutional law. The work of the Assembly of the League and of the Council are brought before the general public by the accounts of their meetings in the press. But there are numerous technical advisory organizations which, with the assistance of the members of the Secretariat, are gradually organizing the work of international co-operation, and their work is by no means so well known as it deserves to be. Mr. Greaves, in his introductory chapter, points out that governments are more and more relying on permanent consultative bodies, and that the League's chief activities have corresponded very closely with that of the national administrative departments. He gives an account of these various bodies, showing the origin of the various commissions and committees, their constitution, terms of reference, personnel, procedure, connexion with other conferences or commissions, and their functions. He does not, however, confine himself to an enumeration of historical facts; he considers, in the case of each of the committees, whether it is solving the world problem before it, and whether any improvement is called for in its organization and methods of work.

The work is divided into two parts. In Part I, the author describes the committees for international technical co-operation of a general character, namely the Economic, Financial, Health, Intellectual Co-operation, Communications and Transit Committees, and the Governing Body of the International Labour Organization. In Part II, he deals with committees and commissions for specific questions, namely, the Permanent Mandates Commission, the Permanent Disarmament Commission and its committees, committees for social and humanitarian work, and the Opium Committee.

Mr. Greaves considers that other committees may be found to be necessary, and suggests the formation of a Minorities Committee on the lines of the Mandates Commission.

The spirit in which Mr. Greaves has done his work is that of a firm believer in the League of Nations, and he points out that the League's truest friends are those most ready to criticize it constructively.

This is a book which all students of the work of the League should possess, as the information it contains is not easily accessible, and the author's comments and criticisms are practical and show a full acquaintance with the working of the system; his comments on the composition and methods of work of the Committee on Intellectual Co-operation are particularly valuable. A. P. H.

Transactions of the Grotius Society, Vol. XVI: *Problems of Peace and War*. London: Sweet & Maxwell. 153 pp. (10s.)

This is a collection of the papers read before the Society during the year 1930. Of the nine papers five are on subjects directly international: "World Legislation", "The Protection of Private Property under the Minorities Protection Treaties", "International Law Making", "The International Charter for Prisoners", "The First Conference for the Codification of International Law". Dr. Edwin Loewenfeld's review of the treatment of minorities raises interesting points and contains valuable information, although every one will not agree with his central thesis that the treaties extend to the absolute protection of private property. In "International Law Making" Professor H. A. Smith gives a highly, and I think unjustifiably, pessimistic survey of the great conferences and conventions before and since the war.

The subjects of the other four papers are Grotius's book on the Jurisprudence of Holland and its influence on the development of Roman-Dutch law, by Professor R. W. Lee; "Contractual Capacity in Commerce", by Mr. Wyndham Bewes; "Aliens in Great Britain", by Mr. E. S. Roscoe; and "Expatriation as practised in Great Britain", by Mr. R. S. Fraser. A. P. F.

Transactions of the Grotius Society, Vol. XVII: *Problems of Peace and War*. London: Sweet & Maxwell. 1932. xviii+194 pp. (10s.)

This volume is characterized both by the merits of its contents and by the variety of the branches of law represented in it. Mr. A. O. Pickering discusses "Recent Insurance Legislation" from the point of view of comparative private law. Private International Law is represented by a paper from Mr. W. Latey, who discusses the international implications of a number of recent decisions, such as those given in the *Nachimson*, the *Salvesen*, and the *Inverclyde* cases. International organization and the settlement of disputes have produced papers from Professor Brierly on "Sanctions", Judge Caloyanni on "The Judicial Policy for the Settlement of International Disputes", and Sir Anton Bertram on "The Economic Weapon as a means of Practical Pressure". The volume also contains papers by Dr. Sundaram on "The International Status of India", by Mr. Vesey-Fitzgerald on "The Iraq Treaty, 1930", and by Professor Redslob of Strasbourg on "The Problem of Nationalities", while the daily bread of the public international law practitioner is represented by Mr. Beckett's paper on "Diplomatic Claims in respect of Injuries to Companies".

It is impossible to comment upon all of these articles and difficult to know which to choose. I think that one at least which will attract wide interest at the

present time is Sir Anton Bertram's searching examination of the first two paragraphs of Article 16 of the Covenant. He describes its *travaux préparatoires*, as, I think, he is entitled to do, its subsequent "parliamentary history" at Geneva, the nature of a "pacific blockade", and the extent to which League Members are already equipped by their municipal law with power to give effect to this part of Article 16. The conclusion which he comes to upon this point is that, out of all the Members of the League, France and Czechoslovakia alone have specifically enacted legislation empowering their Governments to apply economic sanctions under Article 16, though it is probable that Great Britain, by reason of the Treaty of Peace Act, 1919, Finland, and one or two other states may possess the necessary municipal powers. To those who attach importance to the economic sanctions, Sir Anton Bertram's analysis of the grave defects of Article 16 will be most disconcerting, while his opinion as to the steps required to remove those defects will be a challenge to action.

This volume is, in my judgment, above the average in interest and in quality. Not the least attractive feature is the portrait of the Society's President, Professor R. W. Lee.

A. D. McN.

Les Mesures provisoires de Procédure Internationale et leur Influence sur le Développement du Droit des Gens. By Paul Guggenheim. 1931. Paris: Recueil Sirey. 210 pp.

The question of the power of international organs to order or recommend "mesures provisoires" in connexion with disputes which have been referred to them has not been the subject of much study, and this interesting book by Professor Guggenheim is, therefore, to be welcomed. It contains a full and well-documented study of the action which has been taken, and the proposals which have been made, in connexion with such bodies as the Mixed Arbitral Tribunals, the Central American Court of Justice, the Permanent Court, and the organs of the League of Nations, in particular the Council. Although all these bodies are treated together under the general heading of "international procedure", it is plain that they fall into two quite distinct classes, the first being composed of legal tribunals dealing with a "justiciable" dispute which has been submitted to them, and the second of political bodies, such as the Council, dealing with political disputes and, in particular, disputes which may endanger the maintenance of peace. The functions in this connexion of these two classes of bodies are also distinct; the object of "mesures provisoires" ordered by a judicial tribunal is to prevent the existing situation being modified in a way which might prevent or impede the execution of the decision ultimately given; while the object of a body like the Council when taking such measures is really to prevent the peace of the world from being disturbed before a settlement of the substance of the dispute is undertaken. Professor Guggenheim makes this distinction clearly in his introduction. The result, however, is that the bulk of the book is concerned, not with the legal question as to the power of a court to make orders for the preservation of the *status quo* pending a judicial decision, but with a discussion of the various proposals, which have been made in connexion, for instance, with the Treaty of Mutual Assistance, the Geneva Protocol, the Treaty for Strengthening the Means of Preventing War, to confer on the Council power to prevent the outbreak of fighting, or to stop it if it has already occurred, in purely political disputes. The book, therefore, tends to become rather political than legal, but its discussion of these topics is a valuable one.

W.

International Legislation. A collection of the texts of multipartite international instruments of general interest. Edited by Manley O. Hudson. 1931. Washington: Carnegie Endowment for International Peace. Vol. I, 1919-21; Vol. II, 1922-4. cxxxvii+1544 pp. in all. (\$15 for four vols.)

These volumes are in effect the first volumes of an international statute book. They contain the texts of 133 instruments (apart from amending instruments), and two further volumes are contemplated to complete the decade subsequent to the Treaty of Versailles. The editor tells us that he has attempted to give the texts of all instruments "by which three or more states have set up any administrative agencies for the conduct of their normal relations, or by which they have laid down the bases for the conduct of their future relations and co-operation". The materials are arranged chronologically and not systematically, but any disadvantages of this method—the advantages are obvious—are met by the provision of an ample subject list of the instruments.

A pioneer undertaking of this kind presents many difficult editorial problems of language, of text, of exclusion and inclusion, and the like. On these the editor's decisions will be tested by the experience of those who use his work, but a summary examination suggests that they have been wisely taken.

The texts are preceded by a valuable introduction on the nature of international legislation and on some technical problems connected with it. The introduction contains an interesting list of 257 international legislative instruments entered into between the years 1864 and 1914.

J. L. B.

National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations. By Hector Hughes, K.C. London: P. S. King & Co. 1931. xiv+184 pp. (8s. 6d.)

Mr. Hughes is undoubtedly right in his main contention, which is that the compulsory retention of the appellate jurisdiction of the Privy Council is an infringement of the principle of Dominion autonomy, for it is clear that the right to make laws is incomplete without the right to interpret them when made. Again, we may agree with him that the Judicial Committee, as at present constituted, cannot be regarded as a satisfactory tribunal for determining quasi-international disputes between different members of the Commonwealth, at least in those cases where Great Britain herself is one of the parties. Upon the former of these two points Mr. Hughes's argument has now in effect been conceded by the enactment of the Statute of Westminster, which leaves it to the Dominions themselves to determine whether they wish to retain the appeal in all matters of private law. The second point was conceded by the resolution of the Imperial Conference of 1930 advocating the establishment of a Commonwealth arbitration tribunal on the international model.

Mr. Hughes writes primarily as an Irishman, and his book, although in no sense official, may fairly be taken as an exposition of the views held by Mr. Cosgrave's government. In particular, he is at pains to put forward a reasoned defence of the action of the Free State in enacting special statutes designed to nullify appeals by individuals to the Privy Council from the Irish Supreme Court.

In so far as the book is propaganda, its claims have now been conceded, and Mr. Hughes, *qua* advocate, is now *functus officio*. The controversy itself has become a matter of history, but the learning and moderation with which his

argument is presented should make his book indispensable to all those who may wish to make a study of that history.

H. A. S.

Beroep op Volkenrecht voor 1667 (Appel au droit des gens avant 1667), door Lambertus Vincentius Ledebœr. Amsterdam: H. J. Paris. 1932. viii+172 pp.

The *De jure belli ac pacis* was published in 1625, that is about the middle of the period which the author of this thesis has selected for special study. But in the field of International Law theory and practice are apt to diverge. The author's concern is to get down to the bed-rock of actual usage in the first half of the seventeenth century, and at the same time to show how the minds of men of affairs reacted to such ideas as "the law of nations", "sovereignty", "neutrality", and other notions which have since been accepted as constituting the basis of international relations. For this purpose recourse is had rather to the literature of diplomacy and politics than of jurisprudence. The author's method and conclusions are made available to the general reader in Chapters I and III, written in the French language. The second and longest chapter, written in Dutch, contains a mass of detailed information classified under the various departments of what we now call International Law.

The work, within the limits which the author assigns to himself, is a valuable contribution to the history of ideas and of international usage. It is excellently indexed.

R. W. LEE.

Political Handbook of the World, Parliaments, Parties, and Press, edited by Walter H. Mallory. New York: Harper & Brothers for the Council of Foreign Relations. 1932. 200 pp. (\$2.50 post paid.)

This annual publication has become invaluable for all students of international affairs. The political changes which have taken place in the world since its last edition include five revolutions, twenty-six general elections, and numerous Cabinet changes which have brought forward many new leaders. It is enough to say that information will be found regarding such important events as those which led to the formation of the present National Government in Great Britain, the rise of the Spanish Republic, the establishment in power of a minority party in Japan, and the aims of the Hitler party in Germany, to show how useful such a work must be to all students and politicians. We are asked to state that copies may be obtained from the Council of Foreign Relations, 45 East 65th Street, New York City.

A. P. H.

Das Armenische Problem im Lichte des Völkerrechts und Menschenrechts. By André Mandelstam. Aus dem Institut für internationales Recht an der Universität Kiel. Berlin: Georg Stilke. 1931. Heft 15: Erste Reihe Vorträge und Einzelschriften.

On the Armenian problem the author, who was formerly Chief Dragoman at the Russian Embassy in Constantinople and afterwards Director of the Legal Section of the Russian Ministry of Foreign Affairs, speaks with exceptional authority. In Chapter I, which is devoted to a description of the internal condition of the Ottoman Empire and to the relations of the intervening Powers, he traces the course and character of collective intervention in the affairs of the Ottoman Empire since 1774, and shows that the methods used followed a regular sequence: reform, autonomy, and cession of territory. When applied to a

particular province, reform, even when accepted by the Sultan, generally failed through lack of international control, which was only instituted twice: in Macedonia (1905) and in Armenia (1914). Failure always led to desperate risings of the afflicted peoples and to savage repression by the Turks, then to collective intervention involving grant of autonomy, and finally to separation. But loss of a province never taught the Turks sense in the management of their subject races.

Chapter II, which deals with the Armenian problem, traces the antecedents of Article 61 of the Treaty of Berlin, 1878, whereby the Porte promised to acquaint the Powers with the reforms which it undertook to introduce in territory inhabited by the Armenians, and the Powers acquired the right to supervise the execution of the reforms. For evading these obligations, Abdul Hamid's simple plan was to exterminate his Christian subjects. The first massacre in Sassoon in August 1894 led to joint intervention by Great Britain, France, and Russia, and so to a Reform Edict on the part of the Porte on October 20, 1895. The customary evasion led to renewed massacres, in the face of which the three Powers remained inactive and Germany threw the shield of her friendship over the Porte. The Sultan's attention then turned to Macedonia, where he encountered stiffer resistance from the Powers. Despairing of Allied intervention, the Armenians threw in their lot with the Young Turks, only to meet with further disappointments and further massacres which caused Russia to intervene in 1912. In tracing the course of these events, the author, we think, proves his thesis that, all things considered, the general character of European intervention in the Near East prior to the Great War was disinterested and creditable to the interveners.

The terrible experiences of this tortured people during the Great War are then traced. The most detailed account of the massacres instituted by the Turks is due to the Republican German Government, viz. a collection of Diplomatic Documents of the Foreign Office, published under the title of *Germany and Armenia, 1914-18*, by Dr. Johannes Lepsius. From this it is clear that the Turks obtained the promise of the German Government not to place obstacles in the way of Enver Bey's anti-Armenian plans, which he justified by allegations of Armenian espionage and pro-Entente activities. When the proposed deportations to Mesopotamia degenerated into common massacres, successive German ambassadors made unavailing protest. The German documents demonstrate the untruth of the Turkish pretext of Armenian rising.

Finally, the author traces the steady deterioration of the plight of the Armenians after the War, due to the confused and disunited policy of the Western Powers, which conduced to Turkey's advantage. In the unratified Treaty of Sèvres, intervention in the name of humanity reached its climax. In the Treaty of Lausanne it was interred, the New Turkey scoring a victory over the conquerors of the Old. The points establishing this contention are brought out in detail and the causes of the melancholy result well analysed. With the ratification of this treaty the tragic story of the Armenians as protégés of the Western Powers comes to an end.

Part IV gives a critical account of the attitude of (a) Germany, and (b) the Allied Powers, to Armenia in the Great War. In this it is submitted with deference that the author goes too far in charging the Allied Powers with a breach of international law towards these unhappy people. There is, however, a practical reason for his contention. Thanks to the absence of nationality clauses in the

minority provisions affecting the Armenian subjects of Turkey, she has denationalized those of them who are refugees abroad and has confiscated their property. Although thirty-three international lawyers have given the opinion that this is a violation of international law, the victims have no *locus standi* under the minority protection clauses and no recourse to the Permanent Court of International Justice.

The author is to be congratulated on having written a book which is concise, clear, persuasive, and from cover to cover interesting. A. H. CHARTERIS.

International Law in Peace and War. By Axel Möller, Professor of International Law at the University of Copenhagen. Translated into English by H. M. Pratt. Part I. Normal International Relations. London: Stevens & Sons. 355 pp. (20s.)

The punishment inflicted on the builders of the Tower of Babel continues to be a powerful influence preventing International Law from being in practice what it should be—one single body of law, the same all over the world. Differences of opinion amongst the learned are the condition of every system of law which is in a healthy state of growth, but in international law it is unhealthy if such differences run along national lines. Yet if the barrier of language prevents the law schools of (for instance) Great Britain and Scandinavia from following the developments of doctrine on the other side of the North Sea, divergences along purely national lines are the inevitable result. This reason alone is sufficient ground for welcoming the publication by Messrs. Stevens of Mr. Pratt's excellent translation of this work of an eminent Danish Professor of International Law. Owing to its intrinsic merits the utility of Dr. Möller's work to readers of English is, however, not confined to its value as an indication of the views on international law held in his own country. Dr. Möller's book is, indeed, strong evidence against the effectiveness of any language barrier in his country, for he quotes with equal frequency from German, English, and French authors; nor is there any sign in the book of any "Scandinavian International Law". Readers of the Year Book can hardly fail to notice with some satisfaction the numerous references to the Year Book in the notes and the use which the author has made of its articles.

It is a book which should be useful to the student as well as the professor and practitioner. Its general character is rather that of a handbook than a treatise. The most important half of International Law—Normal International Relations—is covered in little more than 300 pages, and yet the book is full of matters of detail. The method of treatment has been to confine the text to short statements of the law or facts relevant to the topic under consideration. Doctrinal discussion is almost entirely eliminated, and in general, on any doubtful or complicated point, the view which the author considers to be the right one is concisely and clearly stated. Such a method of treatment has led, in the present writer's opinion, to a number of passages being too short to be entirely accurate, or so dogmatic as to be slightly misleading. The statement in the section devoted to international conferences that "the plenipotentiaries can sign with or without reservations" (p. 188) is one amongst a number of similar instances. But these disadvantages are more than redeemed by the most useful feature of the book—namely, the very full references in the footnotes and bibliography to other authorities on almost every point which is discussed, together with warnings that the author's view is not uncontested. As the references are to works in all the principal languages, the book may be extremely useful to any

person engaged on an investigation of any particular point of law. On the other hand the general practical, rather than theoretical or doctrinal, character of the work is well illustrated by the fact that the difficult topic of state succession is dealt with in six pages, whereas thirty-two pages are devoted to the section on "non-political treaties", which gives the reader a sort of introduction to the great mass of instruments which regulate international intercourse or co-operation in the ordinary practical affairs of everyday life.

The translation is on the whole excellent, but fails in a few cases (viz. "protocols" is not the correct English rendering of "procès verbaux", nor "Final Protocol" of the words "Acte Final"). Occasionally, as in the sentence on p. 303, "Where rights or obligations depend upon treaties the phrase 'principle of the variable limits of treaties' is used", the translation entirely fails to convey the meaning of the original, but such instances are rare. E.

Folkeretten i Fredstid og Krigstid, Af Axel Möller, Dr. Jur., Professor ved Københavns Universitet. Anden Del I Voldgift, Haagdomstolen, Folkeforbundet, Briand-Kelloggpagten. Copenhagen: G. E. C. Gads Forlag. 1931. 207 pp.

The first volume of this treatise on international law appeared in 1925 and was reviewed in the *British Year Book of International Law*, 1926 (pp. 237-8). An English translation was published in 1931 and is reviewed above.

The second volume, which has now appeared, deals especially with international conciliation and arbitration, the Permanent Court of International Justice, the League of Nations, and the Briand-Kellogg Pact.

A third volume will follow later, dealing with the law of neutrality and war.

The present volume, like the first, has the merit of being up to date, and of possessing an ample list of references.

The author strongly advocates the further development of arbitration procedure. A condition precedent for this is the revision of the notion of sovereignty of states and the establishment of more precise rules in those branches of international law concerning which great uncertainty and considerable doubt still subsist. It would be very difficult to achieve this result by means of codification, but there is a reasonable prospect that the judgments and more especially the advisory opinions of the Permanent Court of International Justice will lead to the further development of international law and endow it with greater precision.

The author is strongly opposed to criticism of the Court's right to give advisory opinions. In fact, he considers that it is precisely by means of its advisory activity that the Court can, *in time*, exert its influence to the best advantage. The Court renders advisory opinions with the same care as judgments, and the interested states are given the same opportunity of appearing before the Court (they are also, contrary to the author's statement, permitted to appoint national judges to sit in advisory cases, see Article 71, paragraph 2, of the Rules of Court as amended on September 7, 1927). The right to ask the Court's opinion should therefore, in the opinion of the author, be extended so that not only the Council or the Assembly but also the different Members of the League of Nations should be able to ask for such opinions.¹

Furthermore, with regard to the question whether the Court is obliged to

¹ Note by reviewer: It is doubtful whether the author has appreciated how seriously this would affect the whole institution of advisory opinions.

give an opinion asked for (Article 14 of the Covenant), he considers that only under quite exceptional circumstances can the Court refuse to give its opinion; but that it would be inconsistent with the fundamental principles of law if the Court were obliged to give an opinion on a question likely to be submitted to the Court later by the interested governments themselves. The fact that one of the interested parties protests is not, however, an adequate reason for the Court to refuse to give an opinion.

As regards the final stipulation of Article 38 of the Rules of Court concerning the Court's power to decide a case *ex aequo et bono*, the author thinks that this must as a rule only be exercised subsidiarily, in the absence of rules of international law in the matter; but, in certain cases, it may be the intention of the parties that when a decision is to be taken *ex aequo et bono* even positive rules should be disregarded.

In the chapters devoted to the League of Nations, the author recommends a further development of sanctions under the Covenant. The participation of the different Members of the League in sanctions must be defined and laid down beforehand, so that the sanctions may be rapid and effective.

In conclusion, the author considers that the League has done more in its short lifetime in the spheres of culture, economics, and law than could have been predicted.

It is desirable that the second volume also of this useful book should be available in an English translation.

J. JORSTAD.

International Adjudications: Modern Series, Vol. III. Edited by J. B. Moore. New York: Oxford University Press. 8vo. xxviii+564 pp.

The first two volumes of Mr. Moore's great enterprise were reviewed in the last number of the Year Book. The present volume deals with the Mixed Commission under Article 6 of the Jay Treaty of 1794, about which, by a series of fortunate accidents, Mr. Moore has been able to collect a large amount of new material, and he is thus able to present a record which is now fairly complete. Mr. Moore evidently thinks that the main cause of the breakdown of the Commission was the obstinacy of Macdonald, one of the British commissioners. On the other hand it is probable that the Commission, constituted as it was without any impartial members, never had much chance of succeeding in the circumstances and temper of the time. The volume includes the reports of the British Commission subsequently appointed to distribute the indemnity paid by the United States under the treaty of 1802.

J. L. B.

Ist an dem Begriff der Völkerrechtlichen Servitut festzuhalten? By Dr. Fritz Münch. 1931. Berlin: Stilke. 8vo. 121 pp.

The author examines in this interesting monograph both the theory and practice of international servitudes, and reviews in detail the decisions reached on this question by international tribunals and bodies, such as the award delivered in 1910 by The Hague Permanent Court of Arbitration in the *North Atlantic Coast Fisheries* case, and the opinion given by the International Commission of Jurists on the *Aaland Islands* in 1920. He doubts whether there exists at present a generally recognized principle of the true conception of international servitudes, although he is in no doubt as to their utility in restoring peace and preventing the wholesale annexation of a disputed territory by the more powerful

nation as, in the author's view, would have happened in the case of Danzig and Upper Silesia. It remains, however, a controverted matter whether the restrictions on sovereignty contained in the Peace Treaties may properly be described as "servitudes". Dr. Münch is distinctly of the opinion that international servitudes are bound to increase in future as a result of the growing interdependence of states, more particularly in the sphere of finance, trade, and disarmament.

C. J. COLOMBOS.

Pufendorf. *The Elements of Universal Jurisprudence* (Elementorum Jurisprudentiae Universales Libri Duo). Oxford: Clarendon Press. 2 vols. xxxvi and xvi+377, and xxxiii+304 pp. (£1 10s.)

This edition of Pufendorf's earlier work of 1660 is issued by the Carnegie Endowment as one of the Classics of International Law. It constitutes No. 15 of the series. The first volume contains the Latin text of Pufendorf's work as it appeared in the edition published at Cambridge in 1672, with an introduction in German by Dr. Hans Wehberg. The second volume contains an English translation of Dr. Wehberg's introduction and an English translation of Pufendorf's work by W. A. Oldfather.

The Carnegie Endowment in No. 10 of the series of Classics of International Law have already published Pufendorf's *De officio hominis et civis juxta legem naturalem*, which was an extract published in 1673 from his larger work *De jure naturae et gentium*, published in 1672.

Like all the Classics of International Law, this edition of Pufendorf's earlier work is admirably got up. The translation is well made and the print is pleasant to read. Men may differ as to the value of Pufendorf's contribution to the science of International Law; he may suffer, as Dr. Wehberg remarks in the introduction, from being much quoted and little read; his style may be tedious, and his views on many subjects may be jejune. None the less it is a great advantage that his works should be available for all students and practitioners of International Law, and we have to thank the Carnegie Endowment for an excellent edition of a work which attracted such attention at the time of its publication that it led to the creation of the first chair of International Law in 1661. C.

The Geneva Experiment. By William E. Rappard. Oxford University Press. 1931. 115 pp.

This little book contains the substance of four lectures delivered in 1931 at the London School of Economics. The first chapter points out the "inherent dualism" in the foundation of the League, which must be settled, the author thinks, if the League is to succeed, by the triumph of the "corporate" over the "co-operative" idea. The second sketches the League's evolution in the first twelve years of its existence, and the third and fourth examine its record in its "secondary" task, the organization of peace, and its "primary" task, the prevention of war, respectively. Professor Rappard's experience, formerly from the inside as an official of the League, and now as a close observer and near neighbour at Geneva, has taught him to see the League as it is, without illusions, but it has not destroyed his hope for the great "experiment". A few years ago he wrote what is still one of the best short books about the League, *International Relations as viewed from Geneva*, and this book is a worthy sequel. Even professed students of the League will find much in it that is fresh and stimulating. J. L. B.

Code des Prisonniers de Guerre. Commentaire de la Convention du 27 Juillet, 1929, relative au traitement des prisonniers de guerre. By Gustav Rasmussen. Geneva: International Committee of the Red Cross.

Mr. Gustav Rasmussen had practical experience of prisoners of war questions in Russia in 1917 and 1918 and was also one of the Danish delegates at the Geneva Conference of 1929. In the present work he does not claim to have travelled beyond a preliminary analysis of the more important provisions of the Convention of 1929. He divides his work into fifteen sections and a conclusion. In section XI (Organization of Control) he deals with the question whether control should be exercised by the International Committee of the Red Cross or the Protecting Power, and maintains, no doubt rightly, that nothing less than the authority of a neutral government is likely to have the necessary weight. In this connexion it is to be observed that the danger of confusion resulting from dual control must not be overlooked. In section XII he deals with the settlement of disputes between belligerents on the subject of the treatment of prisoners of war and violation of the Convention. He explains how it came to be decided that appeal should not be made to the International Committee of the Red Cross or, at all events in the first instance, to the League of Nations, and why it was decided by the Conference to leave the settlement of disputes to the Protecting Powers. In section XIV he discusses (1) the suppression of the clause of conditional applicability; (2) the relation between the new Convention and the Hague Convention (No. 4) of 1907; and (3) the relation between the new Convention and the Kellogg Pact. As to (1) he points out that the clause which would have rendered the Hague Convention (No. 4) of 1907 and the Geneva Convention of 1906 inoperative during the Great War was voluntarily disregarded by the belligerents. As to (2) he shows that certain inconsistencies between the two instruments are more apparent than real. As to (3) he admits that the question might well be raised as to the *raison d'être* of the Convention, having regard to the existence of international instruments abolishing war. He points out, however, that neither the Covenant nor the Kellogg Pact guarantees that there will be no more war and that in any case they have not been universally accepted. He also points out that provision is made in a number of articles of the Convention for action by neutrals, but states that it would be outside the scope of the present work to examine the effect of Article 16 of the Covenant of the League on the traditional conception of neutrality. In section XV he discusses the circumstances in which the Conference decided not to deal with the treatment of civilians in time of war. The question was, he explains, found to be one of great complexity and difficulty and the Conference contented itself with the insertion in the Final Act of a *vœu* of a somewhat indefinite character.

In conclusion Mr. Rasmussen refers to the conflict between the military and humanitarian points of view inevitable at such a conference, and remarks that, if concessions had to be made to the countries asserting the military view, there is at least every hope that they will be able to ratify the Convention.

Annexed to the commentary is a note on the works in which the treatment of prisoners of war is dealt with.

G. R. W.

The Economic Uses of International Rivers. By Herbert Arthur Smith. 1931. London: P. S. King & Son. ix+224 pp. (10s. 6d.)

Westlake has pointed out that there is a descriptive aspect in which International Law may be viewed in addition to the philosophic, and under that

heading he includes the influence of economics, strategy, and geography in the formation of its rules. Professor Smith has made an important contribution to this side of the Law of Nations, and his Essay can be warmly recommended to all students of International Law. Apart from the intrinsic value of the subject-matter it affords a good example of an endeavour to provide rules of action for the future by an examination of the experience gained in past controversies.

Hitherto, most of the writers who have dealt with international rivers have confined their attention to the rights of navigation; this is still in many cases the most important use to which such waterways may be put. But they have other, and in regard to some rivers, much more important parts to play in the economic development of the riparian states. Irrigation and power for electrical plant are to-day of vital importance, and the numerous examples which Professor Smith cites show the methods of approach towards settlement of these difficulties regarding the use of international rivers. Chapter III is particularly useful, as it contains a lucid account of many of the leading controversies such as the Meuse and its canals, the Rio Grande, the Chicago diversion, the Danube percolation, and the Nile apportionment. Disputes between States in the United States which have come before the Supreme Court offer examples of settlement by judicial means, but where such a method is not available, and the parties are left to deal through the diplomatic channel, it is evident that, apart from treaties, the law is still in a nebulous condition. Professor Smith considers that the doctrine of "equitable apportionment of benefits" affords the appropriate principle to be applied, though its application is rather a matter for engineers than for lawyers. The agreement arrived at between Great Britain and Egypt on the use of the Nile for irrigation purposes affords a valuable example of the way in which two states, both actuated by feelings of goodwill, can agree to an arrangement to their mutual advantage.

Professor Smith makes no claim to have discovered a solution of the intricate problems which the economic uses of international rivers raise, but the last chapter contains useful suggestions which he believes are based on the trend of modern practice. There is a valuable Appendix, containing a digest of the treaty provisions on the subject, which must have entailed a great deal of research. The value of the book would have been increased if the reader had been supplied with sketch maps illustrating the various rivers dealt with. A. P. H.

Droit International Maritime Suédois. Par Nils Söderquist. 1930. Paris: Chez l'Auteur, 141 rue St. Honoré. 500 pp.

This work purports to give the Swedish interpretation of the rules of maritime international law, and much of it is useful as representing the Swedish standpoint. A great part of it, however, has no connexion with Sweden or with Swedish law, as it is taken up with discussions on the interpretation of various Hague Conventions and the Declaration of London.

The author divides his subject into the following heads: the Sea, Ships, and Activity on the Sea, and there is much useful information on all these points, but about one-tenth of the book is taken up with a project for Prize Law and Procedure, which the author addresses to the King of Sweden.

Sweden has so often stood for the assertion of neutral rights that we should have expected to find much more on this subject than the scanty treatment accorded in pp. 386-404.

The work would have gained in value by a better arrangement of the topics

and the introduction of headings for the various paragraphs. Certain observations of a personal character do not increase its scientific value. The book has, however, a place in the literature of the Law of the Sea.
A. P. H.

The Foreign Relations of the Federal State. By Harold W. Stoke. Baltimore: the Johns Hopkins Press; Oxford: Clarendon Press. 1931. vii+245 pp. (10s. 6d.)

Dr. Stoke's monograph on the peculiarities of the federal state in foreign relations (he deals with nine such states) explores a little-known field. Four of his ten chapters deal with the constitutional structure of federal governments, with particular reference to International Law. There are no exceptions to the rule that federal states entrust their foreign relations to their central governments. Emphasis is laid upon the point that a treaty may be internationally binding upon the government contracting it, but incapable of fulfilment in municipal law because of internal limitations—a feature more characteristic of federal systems than of any other.

There are, the author suggests, three limitations which are peculiar to federal states in contracting international obligations; seventy pages are devoted to their discussion; they concern the treaty-making power in relation to (1) the territory of the federation, and, in particular, cession thereof, (2) constitutional prohibitions, and (3) reserved rights and powers of the member states. As regards the enforcement of international obligations, "no government has ever pleaded its federal character to escape the cardinal obligations of the law of nations", but there are difficulties, particularly in connexion with the protection of aliens, which exhibit the imperfections of the federal system from an international point of view.

We do not agree with Dr. Stoke that the interest of the British in federalism as a solution for the increasing difficulties of imperial relations is especially strong, except as regards the problem of India. Surely an Imperial Federation has passed out of the sphere of practical politics, if ever it can be said to have been established there?
E. C. S. W.

Le Minoranze di Razza, di Lingua, di Religione nel Diritto Internazionale. By Dr. Mario Toscano. Torino: Fratelli Bocca. (25 lire.)

Following Sabelli, Ollivier, Feinberg, and others, Dr. Toscano thinks that the problem of minorities is not wholly due to the war, but must be linked up with the whole movement of nationality which has pervaded European history since the French Revolution. From the Treaty of Vienna onwards every war has brought about new nationalities by breaking up older units.

Undoubtedly the last war has given rise to new appetites and unreasonable hopes by groups of individuals who, feeling themselves victims of the treaties, keep alive agitations in the world and aspire to constitute themselves into new states. This movement, if encouraged, would certainly not be conducive to universal peace and prosperity, as some would have us think.

The author, after referring to various minorities protection treaties, beginning with the Passau Treaty of August 2-15, 1552, comes to deal with the minorities treaties signed after the war. He makes a thorough survey of the various provisions therein for safeguarding the rights of such minorities. The book is divided into five parts: the first part is headed "Treaties preceding those now in force"; the second is concerned with the definition of the concept of

"minorities", and the author, in giving this, adds to the elements of community of race, language, and religion those of common tradition, territorial cohesion, and special culture. It is only by assembling these various elements that Dr. Toscano is enabled to give us a complete definition. The third part deals with the rights and duties of minorities; the fourth is devoted to procedure and gives an exhaustive account of the functions, in connexion with minorities, of the Secretary-General of the League of Nations, of the powers of the Council, and of the jurisdiction of the Permanent Court of International Justice. The fifth part deals with the tendencies to modify the present position both as regards the rights of minorities and as regards procedure.

It is a volume carefully written, although to an English reader it may appear that its matter might have been more concisely put. It is certainly a successful attempt to review logically and systematically the whole field of the legal position granted the minorities by the recent treaties. GIUSEPPE M. PALLICIA.

Die Deutsch-Oesterreichische Zollunion vor dem Ständigen Internationalen Gerichtshof. Von Dr. Franz Váli. Vienna: Manzsche Verlags- und Universitäts-Buchhandlung. 149 pp.

This is a complete and exhaustive survey of the Austro-German Customs Union case in all its aspects. The origin of the matter, its submission to the Permanent Court, the procedure and argument there, the Opinion of the Court and of the dissenting judges are described in detail and fully discussed. The author has done his work with great care and ability, and expresses his own views with lucidity and moderation. Any one reading this monograph will have little left to learn about the case.

Dr. Váli rightly insists upon the difficulty of the question submitted to the Court, and brings out very clearly the underlying issue: whether to deal with the matter as, so to speak, an abstract question of law, or a concrete question depending upon political and economic factors. He severely criticizes the Opinion of the Court, pays full tribute to Judge Anzilotti's separate opinion, but finds in the joint dissenting opinion the true appreciation of the question. The book closes with a considered estimate of the general effects of this important case, and a strong plea that a clearer line must be drawn between political and legal conceptions if international law is to develop as it should. A. P. F.

International Change and International Peace. By Sir John Fischer Williams, C.B.E., K.C. London: Humphrey Milford, Oxford University Press. 1932. vi+79 pp. (3s. 6d.)

An expansion of three lectures delivered at the Geneva School of International Studies in August, 1931. The object of the book is "to promote discussion of, and direct thought to, this greatest of international problems—the reconciliation of the need of modern man for peace, with the imperious necessity of the process of change, that categorical imperative of the universe". Sir John points out (and it is an essential fact which is obscured by the facile antithesis between "law" and "war") that perhaps the most difficult form of international dispute results from a situation where one state honestly considers that the existing legal situation is unfair and requires modification in its favour. This is, indeed, Sir John thinks, the real definition of the "political" or "non-justiciable" dispute, and he brings out the point that for such a dispute "law" is no remedy; what is wanted is not a law court, which can only declare what the existing legal position

is, but something in the nature of an international legislature, and this we have not got and are not likely to get for a considerable time. For this class of disputes no solution is to be found in efforts like the Geneva Protocol and the General Act, which not only provide no means of modifying the existing legal position, but would tend rather to perpetuate it. The solution is to be found neither by referring all international disputes to a court of law, nor by a rash acceptance of analogies between the national state and the international community; the only hope of advance lies in developing "the work of the League and the organization, the germ of which is to be found in the Pact of Paris".

A quite admirable little book, which, it is to be hoped, will be widely read.

Japan's special position in Manchuria, its assertion, legal interpretation, and present meaning. By C. Walter Young, M.A., Ph.D. Baltimore: the Johns Hopkins Press. London: Humphrey Milford, Oxford University Press. xxxiv+412 pp. (16s.)

Japanese Jurisdiction in the South Manchuria Railway Areas. (Same author and publishers.) xxxv+332 pp. (16s.)

The International Legal Status of the Kwantung Leased Territory. (Same author and publishers.) xxx+249 pp. (12s. 6d.)

These three volumes form a series under the general title "Japan's Jurisdiction and International Legal Position in Manchuria". Together they comprise a detailed and very well-informed study of the subject, and should prove invaluable to any one who may desire to form an instructed opinion as to the nature and legal basis of Japan's special position in Manchuria, which has recently been the subject of so much discussion. The author is thoroughly acquainted with the history and documentation of the question; he has spent much time in Manchuria itself and has had access to sources of information which are not generally available. The books suffer to some extent from a lack of logical arrangement, which results in a good deal of unnecessary repetition, and if the work had been subjected to a process of pulling together and rearranging, it could have been made both shorter and clearer. The author is also rather inclined to assume that the reader possesses his own encyclopaedic knowledge of the facts, and his treatment of particular subjects would sometimes be easier to follow if it were preceded by a brief statement of the actual historical facts on which it is proposed to comment; and, while the author is careful to indicate where the documents to which he refers are to be found, the books would have been more useful if the more important documents had been inserted in an annex.

While the Japanese position in Manchuria is to a considerable extent dependent on legal considerations, the international law interest of the volumes in question is to some extent incidental. Questions such as those of the legal character of the Japanese lease of Kwantung and the position of the various treaties on which Japanese claims are based are treated in an adequate, if not very novel, manner, but on the whole the books will be of more interest to the student of politics who desires to inform himself on the question than to the international lawyer as such.

Presumably the printer and not the author is responsible for the remarkable statement on page 168 of the Kwantung volume that international law is "so inebriate when confronted with the supreme strength of state action".

REVIEWS OF CURRENT PERIODICALS

The American Journal of International Law, 1931. (Vol. XXXV.) No. 1. January, 1931.

The Ninth Year of the Permanent Court of International Justice, by Manley O. Hudson. (pp. 1-25.) Professor Hudson gives a résumé of the decisions of the Court during the year, and discusses the proposed amendments to the Statute of the Court, to which he is favourable; he then gives a brief review of the work of the Court during its first period of nine years.

Violations of Maritime Law by the Allied Powers during the World War, by James Wilford Garner. (pp. 26-49.) Professor Garner replies to an article by Mr. E. G. Trimble under this title in the number of January, 1930. He deals with each of the headings into which Mr. Trimble divided his allegations, and by careful reasoning and reference to precedents reaffirms and maintains the views he expressed during the course of the war and in his work on *International Law and the World War* (1920).

Suits against Foreign States, by Jasper W. Brinton. (pp. 50-62.) The author, who is a Judge of the Court of Appeals of the Mixed Courts of Egypt, deals with a series of decisions in these Courts on the immunity of states from suits in a foreign court.

Foreign Bondholders and the repudiated Debts of the Southern States, by Bessie C. Randolph. (pp. 63-82.) This article gives a valuable summary of the history of the various series of bonds issued by eight of the Southern States of the United States before 1860, which have been repudiated by their respective states. The writer concludes that "there is something wrong in a system which so shelters defaulting states from all accountability, that acts of repudiation and delinquency should thus remain unilateral".

Procedure in Cases involving Immunity of Foreign States in Courts of the United States, by A. H. Feller. (pp. 83-96.) A discussion of the procedural complications introduced in the courts of the United States, particularly in regard to immunities of state-owned merchant ships; references are given to some of the decisions in European states.

The *Judicial Decisions* in this number include that of the Mixed Claims Commission (U.S. and Germany) in the Sabotage cases (the *Black Tom* case and the *Kingland* case).

No. 2. April, 1931.

Limits of the Jurisdiction of the Permanent Court of International Justice, by Frank B. Kellogg. (pp. 203-13.) A reprint of the observations of Judge Kellogg on the Order of the Court (Dec. 6, 1930) in the case of the Free Zones of Upper Savoy and the District of Gex.

Recognition Cases, 1925-30, by Edwin D. Dickinson. (pp. 214-37.) In this article Professor Dickinson brings up to date a review of a group of cases in the British and American courts dealing chiefly with the unrecognized Governments of Russia and Mexico, in continuation of his article on this subject in this *Journal* in 1925. The decisions raise questions of importance, and opinions will be divided on some of them.

Freedom of the Air in the United States, by Blewitt Lee. (pp. 238-51.) The adoption by the United States of the principle of the absolute sovereignty of the air without a right of innocent passage is adversely criticized by the author, referring to the Air Commerce Act, 1926.

Sanctions constraining Diplomatic Representatives to abide by the Local Law, by Chesney Hill. (pp. 252-69.) The writer considers the various remedies which may be sought by persons injured by diplomatic agents in the state to which they are accredited, and gives numerous illustrations from modern cases of the ways in which such cases have been dealt with.

The Treaty-making Power in Japan, by Kenneth W. Colegrove. (pp. 270-97.) A discussion of the modern tendencies in Japan to enlarge the construction of the article of the Constitution of 1889, which vests the treaty-making power in Japan in the Emperor.

No. 3. July, 1931.

The Amended Rules of the Permanent Court of International Justice, by Manley O. Hudson. (pp. 427-35.) Professor Hudson discusses the eighteen amendments made by the new Bench of the Permanent Court, especially those relating to the failure of some judges to attend and the lengthening of the sessions of the Court.

The Proposed Termination of the Iraq Mandate, by Quiney Wright. (pp. 436-46.) An examination of the conditions necessary for the termination of this mandate and of mandates in general.

Problems raised by the General Treaty of inter-American Arbitration, by John B. Whitton and John Winthrow Brewer. (pp. 447-68.) The writers discuss the Pan-American Arbitration Treaty, providing for obligatory arbitration, now before the Senate of the United States, with special reference to the interpretation of the expression "justiciable disputes", the nature of domestic questions, the problem of jurisdiction in interpreting the treaty, and the formation of the *compromis*.

Clauses relating to Reference of Disputes in Obligatory Arbitration Treaties, by Robert R. Wilson. (pp. 469-89.) A useful sketch of the development of the clauses relating to the reference of disputes in treaties providing for obligatory arbitration.

Conclusions of the Parties in the Procedure of the Permanent Court of International Justice, by A. H. Feller. (pp. 490-502.) The conclusions of the parties constitute the most essential part of the pleadings before the Court; the writer considers the cases when these may be amended.

No. 4. October, 1931.

Prize Law and Modern Conditions, by Thomas Baty. (pp. 625-41.) Dr. Baty criticizes Professor Garner's article in the January number, but his treatment is characterized by an absence of appreciation of the doctrine of development. Reference to the opinions of Sir Leoline Jenkins might have shown how that great lawyer would have viewed many of the situations which arose in the late war. Prize Law did not stop short in 1815.

Railway Politics and the Open Door in China, 1916-17, by Paul Hibbert Clyde. (pp. 642-57.) An analysis of the events in 1916 and 1917, showing a divergence between the American and European interpretations of the "Open Door" in China. The prior and subsequent international engagements are also noted.

The Turkish-American Controversy over Nationality, by Leland G. Gordon. (pp. 658-69.) An account of the dispute with Turkey in the case of Turkish subjects who had been naturalized in the United States and then returned to Turkey, and the attempts which have been made, so far unsuccessfully, to reach an agreement by treaty.

National Judges in the Permanent Court of International Justice, by Norman L. Hill. (pp. 670-83.) The system of appointing national judges *ad hoc* is examined; the writer concludes that national judges have probably contributed to the achievements of the Court.

The International Technical Consulting Committee on Radio Communication, by Irvin Stewart. (pp. 684-93.) An article of interest on the technical side to students of Air Law.

Diplomatic Privileges and Immunities of Agents invested with Functions of an International Interest, by Lawrence Preuss. (pp. 694-710.) This article deals with a subject which is in need of regulation by international agreement; this is especially the case where the international functionary is a citizen of the state in which he is fulfilling his functions.

The *Editorial Comment* in all four numbers contains much of international interest, and in the October number attention is drawn to a note by Professor Jessup on the *Estrada Doctrine*, announced by Dr. Gennaro Estrada, Secretary of Foreign Relations of Mexico, on September 27, 1930, in which he stated that thereafter Mexico would no longer act in terms of recognition in respect of *de facto* governments, but would confine its action to continuing or withdrawing its diplomatic representative. The terms of the official pronouncement are set forth in the *Official Documents*, p. 203.

A. P. H.

Revue de Droit International et de Législation Comparée, Tome XII, 1931.

The Review, edited by Professor Charles de Visscher of Ghent, kept up its high standard in 1931. The four quarterly numbers contain many valuable and interesting articles.

Dr. Borchard contributes a useful study of the work done at The Hague Codification Conference of 1930, in connexion with the International Responsibility of States. It seems clear that more might have been achieved if the Conference had occupied itself less with general principles and more with precedents.

H. R. Turkel, of Jesus College, Oxford, writes a short but interesting article on the International Postal Congress in London in 1929. Too little attention is paid to conferences of this kind. They command much less public attention than some of the political conferences.

In the second quarterly number Professor Ivor Jennings of London gives an excellent and detailed summary of the work of the Imperial Conference in London in 1930, and Professor Kunz completes an exhaustive study of Federal States—*Une nouvelle théorie d'état fédéral*. The four articles which Dr. Kunz has contributed on this subject are very learned; they are based on a study of all the federal constitutions in existence, and thereby avoid the error of generalizing from insufficient data.

M. Niboyet gives a good account of the Geneva Conference of 1930 on the Unification of River Law. Great Britain took no part in this conference, and has not become a party to the conventions which it drew up.

Dr. Quint of The Hague also writes on modern tendencies in *Droit Fluvial*, and shows how navigation is ceasing to be the paramount interest. Power production, agricultural interests, such as irrigation and drainage, water-supply for towns, and the need of preventing pollution are all coming to the front.

Professor Fernand de Visscher contributes an interesting article on Foreign Occupations in Belgium under the *Ancien Régime*. The article is founded on a study of Professor van Houtte's work, *Les occupations étrangères en Belgique sous l'ancien régime*, an intense study on an historical basis of occupations in Belgium from the beginning of the war of 1667 to the end of the war of the Spanish Succession. Professor de Visscher appreciates the point that this is the proper way to study international law.

Those who are interested in criminal law should read M. Mercier's article on the proposals he submitted to the Institute of International Law at the Cambridge meeting for the revision of the Munich Rules of 1883 as to conflict of criminal jurisdiction. So far as concerns the right of a state to exercise jurisdiction over a foreigner for an offence committed abroad, the Institute rejected the greater part of M. Mercier's proposals. Another article of interest from the point of view of criminal law is one by Professor Paul Demeur as to the best method of securing unification of the law as to criminal jurisdiction in collision cases. The decision of the Permanent Court of International Justice in the *Lotus* case has left an unsatisfactory position. Professor Demeur thinks the only solution will be an international convention recognizing a priority for the jurisdiction of the flag state—there may, of course, be two, if both ships are in fault—if the collision takes place on the high seas, with liberty to the state of the victim to exercise jurisdiction if none is exercised by the flag state. In collisions in territorial waters the jurisdiction of the local state should be recognized in all cases.

Mention may also be made of articles by Dr. Rundstein on the *Fondement de droit international et le problème de la compétence étatique*; by Dr. Ross of Copenhagen on the Sovereignty of States and the League of Nations; and also of an article by Mr. Hazard of Washington on the "Ethnical Restrictions on Naturalization in the United States of America". The article contains a good history of the Nationality laws in the United States.

The notices in the *Revue* of articles in other periodicals devoted to international law and the reviews of books are, as usual, excellently done. C.

Zeitschrift für öffentliches Recht, herausgegeben . . . von Hans Kelsen. Schriftleiter: Alfred Verdross. Band XI. 1931. Wien und Berlin: Verlag von Julius Springer. 550 pp. (RM. 39.20.)

This volume comprises four numbers, which contain twenty-seven articles and no fewer than one hundred and fifteen reviews. The scope of the term "öffentliches Recht" is shown by the division of these latter into notices on Staats- und Verwaltungsrecht (41), Völkerrecht (47), Rechtsphilosophie und Gesellschaftslehre (22), and Staatskirchenrecht (5). Völkerrecht and Staatsrecht merge into one another by way of Rechtsphilosophie and Gesellschaftslehre. And though on the whole the journal attains its aim of catholicity—there are contributions from Massachusetts, Messina, Strasbourg, Copenhagen, and Geneva, as well as from Germany and Austria—it is perhaps inevitable that this philosophical discussion should centre round the closely related theories of the collaborating editors, Hans Kelsen and his former pupil, Verdross.

As Dr. Leo Cross says, in his excellent sketch of *Der Rechtsbegriff des Common Law und das Völkerrecht*, the philosophical problems as to the nature and validity of international law still exercise the minds of continental jurists in a way which is foreign to jurists trained in the Common Law. He is also probably right in suggesting that Kelsen's *Reine Rechtslehre* has first made possible a satisfactory theoretical approach to the conclusions on these points which Common Law jurists have assumed in practice. This possibility will, however, only materialize if the "pure theory of law" is allowed to maintain its purity. Dr. Margit Kraft-Fuchs, in *Kelsens Staatstheorie und die Soziologie des Staates*, shows that to maintain the purity of legal theory is in no way to decry the importance of a separate sociological treatment of the State. The attempt of Verdross, however, to construe Kelsen's purely hypothetical Grundnorm as an absolute value cannot but lead to a confusion of issues. This confusion seems almost hopeless in Dr. von der Heydte's essay in *Syncretismus*—"Der Verpflichtungsgrund des Völkerrechts"—in which the author tries to accept the idea of a Grundnorm from the *Reine Rechtslehre*, but to formulate it as the Rechtsbewusstsein dictates ('*sum cuique*') and at the same time identify it with a true conception of *Naturrecht*. Dr. Rudolf Métall is on much firmer ground when in *Skizzen zu einer Systematik der völkerrechtlichen Quellenlehre* (which should be read) he claims that the Grundnorm should be simply a logical postulate whose function is to describe the highest law-creating agency or agencies in a given legal system. This seems to correspond to Salmond's "ultimate legal principles", of which at least one must be postulated in every system. Dr. Métall argues most forcibly against the attempt to construe such a principle as an absolute value, but although such a principle is necessarily "*nicht gesetztes*", there is no reason why it should be considered "*über positives*", if positive be construed as meaning "observed and followed in practice". This final step would bring the *Reine Rechtslehre* very near to the empirical ways of thought of the Common Law jurist, and Dr. Métall's contribution towards this step is an important one.

It must not be thought that this interesting volume contains nothing but philosophy. Space, however, does not permit more than mention of articles on *Völkerbund und Staatssouveränität*, by Dr. Alf. Ross; *Die allgemeinen Rechtsgrundsätze im Völkerrecht*, by Dr. Elfried Härle; *Die völkerrechtliche Rechtspersönlichkeit des Staates Città del Vaticano*, by Dr. Balladore Pallieri; *Das Prüfungsrecht des internationalen und des nationalen Richters gegenüber völkerrechtswidrigen Gesetzen*, by Dr. Peter Steinbach; and *Neutrale im Landgebiete Kriegführender*, by Dr. Fritz Bleiber.

B. E. K.

Niemeyers Zeitschrift für Internationales Recht, Vol. XXXIV (Redaktions- und Verlagsbüro, Kiel, Kitzeberg 22),

includes an interesting examination by Dr. Walther Lewald of the doctrine of the *renvoi* in English law. The commentator discusses recent decisions of Maugham J. and Luxmoore J. and Lord Russell of Killowen, and remarks upon "the ruling tradition of English decisions, which imposes on the judge the task of suppressing his own personal views and maintaining the authority of precedents—an operation in which little weight is given to personal views if only the demands of formal logic are satisfied". Among other articles we note one on "Germany and the Dutch-Belgian Scheldt Question" by Lederle. The volume contains a large number of official documents of international interest.

J. F. W.

Rivista di Diritto Internazionale—Series III, Vol. X (1931). Rome (Athenaeum, Società Editrice Romana). 1931. 608 pp.

An interesting series of articles by Professor Balladore Pallieri appears in this issue on "the problem of a lawful war in common International law and under the League of Nations". The author examines in detail the modifications which the League Covenant—and particularly Article 15—made on the common law principle that nations have a right to go to war for the defence of their rights, and argues that such modifications did not prove thorough or effective, as the Covenant still leaves states various possibilities of resorting to war without openly breaking their engagements. The Covenant should not, therefore, be classed amongst the doctrines which profess that war may be abolished by simply prohibiting it, but should be classed amongst the doctrines which, with a more intelligent and profound vision of the realities, recognize that the abolition of war requires a complete change in the rules of International Law and new means for the peaceful determination of a whole series of state interests which at the present time can only be solved by resort to war. Professor R. Ago writes on the rules of private international law contained in the recent Italian draft code of civil law. Nationality continues, as before, to be the basis on which personal status is to be determined, but the new code accepts two subsidiary criteria: domicile or, in its absence, residence, in all cases where a person's nationality cannot be ascertained. The author, however, declares himself to be opposed to the solution adopted on the doctrine of *renvoi*, which is rejected in the new code except when foreign law refers the determination of the dispute to the provisions of Italian law. This solution appears to him to be "anti-juridical", on the ground that if the doctrine of *renvoi* is not to be recognized, such refusal of recognition should apply to all cases without any exceptions in favour of Italian law.

Professor Salvioli discusses in a short, but very ingenious, article the question whether there exists at present a unanimous conviction amongst nations that international law should be construed as allowing a state to do every single act which is not expressly prohibited to it.

Professor Baldassarri contributes an article on extradition as adopted by the recent Italian Criminal Code, and fully approves the new rule which it contains that its provisions only apply to such matters as are not governed by international treaties or international custom or usage.

Dr. Claudio Baldoni reviews, in a very interesting article, the composition and functions of the "Organs and institutions in international unions" and arrives at the conclusion that the relations uniting the individuals to the unions need not necessarily be juridical. In an exhaustive analysis of the League of Nations and its subsidiary organizations, the author is of the opinion that a clear distinction must be drawn between their international activities and those activities which they display under municipal law.

The *Rivista* contains, further, some interesting discussions of "practical cases of international law", and also a digest of the judgments of the Italian courts on points of international law together with such judgments of foreign tribunals as relate to Italian parties or interests.

C. J. C.

Rivista Italiana di Diritto Internazionale Privato e Processuale. Genova: S. A. Editrice G. B. Marsano, 24, Via Casaregis. (Yearly subscription, 100 lire).

This new Review has met with a very good reception in Italy. It is edited by Signor Prospero Fedozzi, a well-known professor of International Law at the

Royal University of Genoa, whose writings are everywhere regarded as authoritative.

The growth of relations between individuals belonging to different nations after the war has produced an abundant crop of questions in the field of the Conflict of Laws. The new Review has special value in that its subject is not limited to dealing with the conflict of laws as a branch of the law of Italy, but it deals also with the principles of Private International Law in general. One of its objects is to help towards the codification of Private International Law in Italy, which is going through a profound transformation, and also towards the international codification of Private International Law.

The aims of the Review are not only scientific but also practical; and its advent will be hailed by all those whose daily work is the ungrateful task of attempting to reconcile irreconcilable systems of law.

GIUSEPPE M. PALLICIA.

Acta Juris Hungarici. Revue Trimestrielle de Droit Hongrois. 1^{ère} année. Janvier-mars 1932. No. 1. The Hague: N. V. Nijhof; and Paris and Berlin. (£1 yearly.)

We have to welcome the first number of this Review, the principal object of which is to make known to foreign jurists the contemporary work of their Hungarian confrères. The articles are published in French, English, or German at the choice of the authors. The present number is prefaced by an introductory notice by Baron Korányi, now Minister of Finance in Budapest, and for many years the very able and popular Minister of Hungary in Paris. The first number is about equally divided between articles on international and domestic topics. Its spirit may be gathered from the following sentence from Baron Korányi's preface: "The wish to make known to the world what is done within our frontiers must be considered to be well justified at this period when, fortunately, international co-operation in all intellectual and material spheres is being developed—a co-operation which we welcome with all our hearts, as we recognize its importance for the future of a better organized Europe."

Annuaire de l'Association Yougoslave de Droit International. (Première Année 1931.) Belgrade-Paris: Les Éditions Internationales, 4 bis, rue des Écoles. 445 pp.

The Yugoslav International Law Association has had the happy idea of publishing under the auspices of MM. Novakovitch, Soubbotitch, Przic, and Tchirkovitch, a year book of international law with special reference to the problems of Eastern Europe. The editors have acted wisely in making their valuable work more easily accessible to the world at large by the use of the French language.

The present volume is divided into seven principal sections: (1) *International Co-operation*, including, among other valuable contributions, addresses delivered at Belgrade by Sir Eric Drummond and M. Albert Thomas; (2) *Public International Law*, wherein we notice the attention devoted to the problem of minorities; (3) *Private International Law*; (4) *International Criminal Law*; (5) *International Case Law* ("Jurisprudence" in the French sense); (6) a *Bulletin Bibliographique*, analysing some recent works specially relating to Yugoslavia, to the Danube, and to international treaties to which Yugoslavia is party; (7) *Local*

Case Law of Yugoslav tribunals in relation to international law. In addition the volume contains a list of treaties, bibliographies of current international law (it is to be hoped that next year's publication will include a notice of contemporary British publications), and other notices.

We venture to extend a warm welcome to this eminently scientific contribution to the study and development of international law throughout the civilized world.

J. F. W.

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(In this Bibliography the following abbreviations are used: Acad. dip. int.=Académie diplomatique internationale; A.J.I.L.=American Journal of International Law; B.Y.B.=British Year Book of International Law; H.R.=Recueil des Cours, Académie de Droit International de La Haye; J.D.I.=Journal de Droit international; L.Q.R.=Law Quarterly Review; Niemeyers Z.=Niemeyers Zeitschrift für internationale Recht; Rev. de dr. int. et de lég. comp.=Revue de droit international, et de législation comparée; Rev. Gén.=Revue générale de droit international public; Rev. de dr. int.=Revue de droit international; Rev. de dr. int., de sci. dip. et pol.=Revue de droit international, de sciences diplomatiques et politiques; Rev. de der. int.=Revista de derecho internacional; Riv. di dir. int.=Rivista di diritto internazionale; Z. f. V.=Zeitschrift für Völkerrecht; J.C.L.=Journal of Comparative Legislation and International Law.

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